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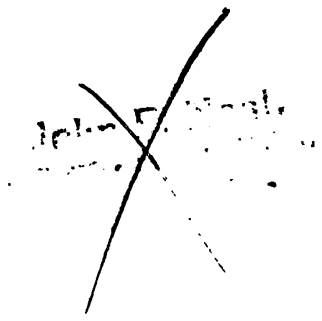

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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

BY

HORACE GRAY, JR.

VOLUME XIII.

BOSTON:
LITTLE, BROWN AND COMPANY.
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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY.
HON. THERON METCALF.
HON. GEORGE T. BIGELOW.
HON. PLINY MERRICK.
HON. EBENEZER R. HOAR.

ATTORNEY GENERAL.

HON. STEPHEN H. PHILLIPS.

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NOTICE.

The cause of the appearance of this volume while the intermediate volumes are unpublished, is to be found in the following section of the statute of 1859, chapter 196:

"Sect. 48. The supreme judicial court shall, as soon as may be after the decision of the questions submitted to them, send down such order, direction, judgment or decree, as may be fit and proper for the further disposition of the cause, by a rescript which shall also contain a brief statement of the grounds and reason of the decision announced; and such rescript shall be filed in the case. And if no further report of the decision is written out within sixty days from the date of such rescript, the reporter of decisions shall report the case, with the opinion contained in such rescript."

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

AT THE

SESSION IN BOSTON IN JUNE 1859.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. GEORGE T. BIGELOW,
HON. PLINY MERRICK,
HON. EBENEZER R. HOAR,
} JUSTICES.

MEMORANDUM.

ON the twelfth day of April 1859, the Honorable EBENEZER ROCKWOOD HOAR, of Concord, was appointed a Justice of this court, in place of Mr. Justice THOMAS, resigned, and took his seat upon the bench on the sixteenth day of April, at the term of the court then held at Boston in the county of Suffolk.

WILLIAM H. DINGMAN *vs.* HENRY MYERS.

Audita querela may be maintained by a judgment debtor, residing out of the Commonwealth, and not served with process, to set aside an execution taken out by the creditor

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without first filing the bond required by the Rev. Sts. c. 92, § 6; even after the execution has been levied upon his real estate and returned satisfied.

AUDITA QUERELA. At the trial in the court of common pleas in Berkshire, the following facts were proved: Myers sued out of that court a writ of attachment against Dingman, who was described therein as formerly of West Stockbridge, but now of the State of New York, and who in fact was not then, or ever since, a resident of this commonwealth. There was no service upon him and no appearance by or for him in the action. At the return term, it was suggested that he was out of the Commonwealth, and an order of notice was passed and complied with. Judgment on default was obtained against him, and an execution issued thereon, without any bond having been first given by Myers, and was levied upon Dingman's real estate, and returned satisfied. Myers conveyed away the estate levied upon and set off to him, by deed duly recorded, and afterwards filed a bond in the action.

Upon these facts, *Mellen*, C. J. ruled that the writ of *audita querela* could not be maintained, and the plaintiff alleged exceptions, which were argued at Lenox at September term 1858.

J. Price, for the plaintiff.

J. E. Field, for the defendant. The ruling was right. At the time of the issuing of the writ of *audita querela* the plaintiff's land had been taken in execution, and the execution had been returned satisfied. Injury or danger of injury is essential to the maintenance of the writ. *Coffin* v. *Ewer*, 5 Met. 228. *Kimball* v. *Parker*, 7 Met. 63. *Hadlock* v. *Clement*, 12 N. H. 68. *Bryant* v. *Johnson*, 24 Maine, 304. *Phelps* v. *Slade*, 13 Verm. 195.

DEWEY, J. The giving of a bond to repay the amount of the judgment, if reversed on review within a year, was a prerequisite to issuing an execution, and imperatively required by the Rev. Sts. c. 92, § 6. For this error the question now arises, what is the proper remedy? A writ of error does not lie in such case, as was held in *Johnson* v. *Harvey*, 4 Mass. 483. The defendant in the former suit might have sued out a writ of review within a year after the rendition of the judgment. We

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think he may also resort to his writ of *audita querela*, given by the Rev. Sts. *c.* 112, § 1. This seems to be sanctioned by the court in their opinion in the case of *Johnson* v. *Harvey*, above cited. In *Lovejoy* v. *Webber*, 10 Mass. 103, it was said that the cases where *audita querela* is a proper remedy are left to be determined by the rules of the common law. It was also held to be a concurrent remedy with a petition for review.

This form of proceeding has more usually been resorted to, to procure a discharge from an illegal arrest improperly obtained, or a release of property from being sold upon an execution then in force, and in the hands of an officer. But this remedy is not thus restricted. 2 Saund. 148, *notes*. Com. Dig. Audita Querela, A. *Gridley* v. *Harraden*, 14 Mass. 497.

Upon the facts offered in evidence, the writ of *audita querela* was a proper remedy, the execution issued illegally, and all proceedings under it must be vacated. *Exceptions sustained.*

MORRIS CONGDON *vs.* FREDERICK PERRY & wife.

Money paid on an oral agreement for the purchase of land cannot be recovered back if the party who received it is ready and able to perform the contract on his part.

ACTION OF CONTRACT for work and labor. Answer, that they were performed under an oral agreement that they should be applied in part payment for a lot of land which the defendants had agreed to convey to the plaintiff, and that the defendants had always been ready and willing to comply with their agreement. Trial in the court of common pleas in Berkshire, before *Mellen*, C. J., who instructed the jury that upon the facts found by an auditor to whom the case had been referred, (the substance of which is stated in the opinion,) the defendants were entitled to a verdict. A verdict was returned accordingly, and the plaintiff alleged exceptions, which were argued at Lenox at September term 1858.

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J. Price, for the plaintiff.

J. E. Field, for the defendants.

Dewey, J. It was held by the court, after full consideration of the question, in the case of *Coughlin* v. *Knowles*, 7 Met. 57, that an oral contract for the sale of land is not utterly void by the statute of frauds, and that a party who advances money on such contract cannot recover it back if the other party is able and willing to fulfil the contract on his part. The application of this rule of law to the facts in the present case, will require us to enter judgment for the defendants. The services of the plaintiff, for which he now seeks to recover, were in part performed before the making of the contract for the purchase of land of the defendants, and in part afterwards. We must assume that all the work done after the making of that contract was to be applied to the payment for the land. The auditor finds that the plaintiff so stated, while he was performing the work. The case stands thus: The plaintiff had a demand against the defendants for services performed, payable in cash, and for which he might have enforced payment. Having such a demand, he made an oral contract with the defendants to purchase a parcel of real estate for the price of $300, and agreed at once to apply towards payment of the same the amount of the defendants' debt to him, and to pay the remainder in future personal labor. This arrangement discharged the demand for previous labor, as it was received as so much cash paid towards the land. The plaintiff could no more reclaim it upon his own failure to entitle himself to a conveyance of the land, than he could a like sum in bank bills which he had paid the defendants. It was voluntarily thus applied, and would have enured to the benefit of the plaintiff but for his own subsequent default. Had the defendants been in default, or failed to perform their part of the contract, the plaintiff might, upon such failure, have recovered compensation for all the services he had performed. But while thus ready and able to make the conveyance of the land as stipulated on their part, the other party cannot compel them to refund payments made upon such oral contract for the purchase of land. *Exceptions overruled.*

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Samuel Scovill *vs.* Lyman Kinsley & another.

Relief in equity may be had by A against B and C, for nonperformance of an agreement in writing, by which A, with B's consent, assigned to C all A's share in a partnership between A and B; B and C covenanted to assume the debts of that firm; and A and B agreed with C that such debts should not exceed a certain amount.

In a suit in equity by an outgoing partner, for the nonperformance of an agreement by his copartner and a new member of the firm, to assume and pay the debts of the old firm to a certain amount, which the members of the old firm have agreed such debts shall not exceed, the plaintiff need not aver that the defendants have paid debts to that amount.

Action of contract, praying for relief in equity under *St.* 1853, *c.* 371, against Lyman Kinsley and Mason S. Palmer.

The declaration set forth an instrument under seal, dated the 21st of December 1853, between Kinsley, as party of the first part, Scovill, as party of the second part, and Palmer and Scovill, as party of the third part, by which Scovill, with the consent of Palmer, assigned and transferred to Kinsley all Scovill's interest in a lease from the Briggs Iron Company to Palmer & Scovill, and in all the partnership property of that firm; and Kinsley, in consideration of said sale and assignment, "covenants and agrees with said Scovill to pay him the sum of eighty one hundred dollars on demand, with interest from the first day of December 1853; and further agrees and covenants to assume with said Palmer all the debts, contracts, claims and liabilities against the said Palmer & Scovill, of whatever name or nature, which existed on the first of December 1853, and which had their origin in and went to the benefit of any of the transactions under said lease, as a partnership concern, and to hold said Scovill harmless therefrom;" and Palmer and Scovill covenanted and agreed with Kinsley that the aggregate amount of such debts, liabilities and claims did not and should not exceed the sum of eighteen thousand dollars, and that Kinsley should not be liable beyond that amount; that all accounts of Palmer & Scovill should be adjusted and settled within sixty days from the date of the instrument; and that no persons

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employed by Palmer & Scovill should be paid for past services above a certain rate.

The declaration then alleged that at the date of this instrument there was due and owing from the firm of Palmer & Scovill to the plaintiff the sum of four thousand dollars, part of the sum of eighteen thousand dollars mentioned in the instrument, and that "by force of said instrument, and in virtue of the obligations devolving on said Palmer," the defendants became liable to pay the plaintiff this amount of four thousand dollars; but had neglected so to do, and had also neglected to settle and adjust the claims and accounts of Scovill within sixty days from the date of the agreement; and that the defendants had overpaid for past services rendered to Palmer & Scovill, and had made other excessive payments, amounting in all to the sum of four thousand dollars.

The declaration prayed for due relief in equity, for an exhibit of all the alleged claims or debts against Palmer & Scovill, required to be paid as provided in the agreement, and for further relief.

The defendants demurred to the declaration, because it did "not state a cause of action at law or in equity, substantially in accordance with the provisions of the practice act of 1852, and of the act of 1853, *c.* 371, giving equitable remedies in suits at law: 1. Because said declaration does not disclose a case within the equitable jurisdiction of this court; 2. Because, if the court can entertain jurisdiction of said suit at law, then the declaration should allege that said defendants had not paid and were not liable to pay just debts of Palmer & Scovill under said agreement, amounting to eighteen thousand dollars."

This demurrer was argued at Lenox at September term 1858.

J. D. Colt, for the defendants.

I. Sumner, for the plaintiff.

Dewey, J. The nature of this contract, and the liabilities to be adjusted in this suit founded thereon, present a case falling within the provisions of the Rev. Sts. *c.* 81, § 8, and *St.* 1853, *c.* 371, by which the present form of action is authorized in cases where there are more than two parties having distinct rights and interests.

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At the hearing of this cause, questions must arise as to the amount of the debts due from the late firm of Palmer & Scovill, in reference to which questions Palmer has an interest, as well as Scovill and Kinsley. Although the covenant to pay these outstanding debts seems to have been made more directly by Kinsley, and an ordinary action at law upon this instrument might be confined to him as the party defendant, yet we cannot doubt that in this form of action, where relief is sought in equity, Palmer is properly made a party.

It is no sufficient objection to the maintenance of this action, that the plaintiff does not more distinctly negative the existence of debts against the late firm of Palmer & Scovill to an amount exceeding eighteen thousand dollars. That provision will avail the defendant Kinsley in his defence. The effect of it is to secure Kinsley that "he shall not be bound to assume any responsibility, or be liable for any sum exceeding eighteen thousand dollars," and this is the form in which it appears in the contract. *Demurrer overruled.*

ADNA B. CULVER & others *vs.* CALEB BENEDICT & another.

A broker in New York, to whom negotiable securities had been entrusted by their owner for the purpose of raising money thereon for him, delivered them, one in Connecticut, and the others in Massachusetts, pursuant to an agreement made in New York, as security for a preëxisting debt of his own. *Held*, that his creditor, if he took them in good faith, could not be compelled in equity to give them up to the owner, although by the laws of New York a transfer made under such circumstances is subject to the rights of the real owner.

The brother in law of one who as stakeholder is made a party to a suit in equity is not disqualified to take a deposition in the case as magistrate.

BILL IN EQUITY against Caleb Benedict and Edward F. Ensign to obtain possession of nine bonds for $1,000 each, issued in Indiana by the Logansport, Peoria and Burlington Railway Company, and payable to bearer.

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The plaintiffs in their bill alleged that, being the owners of the bonds, they delivered them to Edward Soley to procure a loan on them for the plaintiffs, and for no other purpose; that Soley, without right or authority, deposited them in the hands of Benedict; that they were now in the hands of Ensign, who had signed a receipt for them, by which he agreed to hold them in trust for the real owner, and, upon proof of the ownership, to deliver them to the owner; and that the plaintiffs had fully proved their ownership, but Benedict and Ensign had refused to deliver them to the plaintiffs.

Benedict, in his answer, alleged that he received the bonds from Soley as security for debts due from Soley to him, and for his liabilities as indorser for Soley, and received them in good faith in the ordinary course of business, and then and now believed that Soley owned them.

Ensign answered that he received and held the bonds as stakeholder, at the request of the plaintiffs and Benedict; and submitted himself to the order of the court.

At May term 1858 in Berkshire, *Metcalf*, J. submitted the cause to a jury; and there was evidence of the truth of all these allegations; and it appeared that the agreement between Soley (who was a broker in New York) and Benedict was made in New York, and that, pursuant to that agreement, eight of the bonds were delivered by Soley to Benedict in this county, and the other one in the State of Connecticut.

Among the material evidence introduced by Benedict was the deposition of one Hillyer, taken before a justice of the peace, who was the brother in law of Ensign. The plaintiffs objected, at the taking of this deposition, to its being taken by said justice, on account of his connection with Ensign; and at the trial they objected to its admission for the same reason. But the court overruled the objection.

It was admitted at the trial, that by the law of the State of New York bonds transferred as these were alleged by Benedict to have been could not be held against the true owner; and the plaintiffs contended that the law of New York governed this

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case; and that if they deposited the bonds with Soley for the purpose alleged, and he, without their authority, transferred them to Benedict, merely as collateral security for a preëxisting debt or liability, pursuant to a promise made in New York, then the plaintiffs were entitled to recover.

But the judge instructed the jury, "that if Soley, to secure Benedict for his prior claims and liabilities, delivered said bonds to him as collateral security, and Benedict received the same, not knowing and not having reasonable cause to believe that the bonds belonged to the plaintiffs, then, wherever Soley promised or agreed to let Benedict have said bonds as security for what he owed Benedict, upon the evidence respecting the delivery of said bonds to Benedict, he was entitled to hold the same against the plaintiffs."

The jury returned a verdict for the defendants, and the plaintiffs alleged exceptions, which were argued at Lenox at September term 1858.

I. Sumner, (*H. L. Dawes* with him,) for the plaintiffs. 1. A party taking a promissory note or other negotiable instrument, merely as collateral security for a preëxisting debt due him from his indorser or assignor, without other consideration, is not a holder for valuable consideration; but his rights are subject to the equities existing between the person from whom he receives it and the real owner. *Bay* v. *Coddington*, 5 Johns. Ch. 54, and 20 Johns. 637. *Stalker* v. *M'Donald*, 6 Hill, 93. *Chicopee Bank* v. *Chapin*, 8 Met. 40. *Thompson* v. *Shepherd*, 12 Met. 311. *Washington Bank* v. *Lewis*, 22 Pick. 32, and other cases cited in *Bramhall* v. *Beckett*, 31 Maine, 205, in which, upon a careful collection and revision of the authorities, this is shown to be the law of New York, New Hampshire, Connecticut, Pennsylvania, Massachusetts, Maine, and the circuit court of the United States for this circuit.

If there were a conflict between the law of Massachusetts and the law of New York on this subject, the law of New York, where the contract was made, must govern. *Carnegie* v. *Morrison*, 2 Met. 381. *Blanchard* v. *Russell*, 13 Mass. 1. Minot's Digest, Conflict of Laws, III. One of the bonds was delivered

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in Connecticut, where the law is the same as in New York. *Brush* v. *Scribner*, 11 Conn. 388.

2. If Benedict had received the bonds as security for a debt contracted at the time of the transfer of the bonds to him, he could only hold to the amount of his debt or liability. *Chicopee Bank* v. *Chapin*, 8 Met. 40.

3. The deposition of Hillyer ought to have been excluded, for the reason stated in the report. *Sanborn* v. *Fellows*, 2 Foster, 473.

J. D. Colt, (*J. Rockwell* with him,) for the defendants.

Dewey, J. The plaintiffs seek to recover the possession of certain railroad securities, usually called bonds. These securities more closely resemble promissory notes payable to bearer. They are put in circulation, and pass from hand to hand by delivery, and are thus bought and sold in the stock market, no formal transfer being required; and interest is paid thereon to whomsoever demands the same, upon presentation thereof, or the coupons attached thereto.

The right of the defendant Benedict to retain these securities as against the plaintiffs must be decided upon the same principles as if they were negotiable notes made payable to bearer. Indeed this matter seems to be distinctly settled by legislative enactment. By *St.* 1852, *c.* 76, "all bonds and other obligations under seal for the payment of money, purporting to be payable to the bearer, or some person designated or bearer, or payable to order, which have been or hereafter shall be issued by any corporation, are made negotiable, in the same manner and to the same extent as promissory notes are now negotiable." *Chapin* v. *Vermont & Massachusetts Railroad*, 8 Gray, 494. *White* v. *Vermont & Massachusetts Railroad*, 21 How. 575.

These bonds were transferred to Benedict, as the case finds, as security for debts due from Soley to him, and for certain liabilities of Benedict as an indorser for Soley. They were all received by Benedict in Massachusetts, except one, which was delivered to him in Connecticut. They were all received by him in good faith, and without any reason for supposing any fraudulent act on the part of Soley in passing them over to

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him. But it now appears that these bonds were, when delivered to Soley by the plaintiffs, the property of the plaintiffs, and that they were entrusted by them to Soley for the purpose of procuring a loan thereon for the benefit of the plaintiffs, and for no other purpose. The inquiry is, who has the better title to these bonds?

1. As to the place where this transfer must be deemed to have been made. None of these bonds were transferred to Benedict in the State of New York, but eight of them were delivered to him in Massachusetts, and one in Connecticut. The transfer must be dealt with as a Massachusetts contract, under the circumstances disclosed.

Such being the case, the point urged upon us, that by the law of New York a transfer of negotiable securities, in discharge of a preëxisting debt, or as collateral security therefor, is taken subject to the equities between prior parties, if it could be considered as applicable to a case like the present in the courts of New York, can have no effect here. By the law of Massachusetts, the receiving of a negotiable note, in payment of a pre-existing debt, or as collateral security for the same, excludes all the equities between the original parties thereto. Of course, it must be taken in good faith, and without notice of anything to impeach its validity as a just debt. *Blanchard* v. *Stevens*, 3 Cush. 162. *Chicopee Bank* v. *Chapin*, 8 Met. 40. *Stoddard* v. *Kimball*, 6 Cush. 469.

2. As to the right of the plaintiffs to hold the surplus of the bonds, if any, after discharging the liabilities of Soley to the defendants, we do not perceive any question raised in the report of the case. The case differs essentially from *Chicopee Bank* v. *Chapin*, 8 Met. 40, as that was a suit against the party liable to pay the note. Here the matter in issue is the right of property in these bonds. The plaintiffs have failed to establish that right upon any facts stated in the case.

3. An objection was taken to the competency of the deposition of Hillyer. This objection, we think, cannot avail the plaintiffs. The defendant Ensign has no interest in the suit, and is not affected by a decision in favor of either of the real parties. He was constituted a trustee for both parties. His brother in law,

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the magistrate who took the deposition, cannot be said therefore to be related to any party in interest in the present suit.

Judgment for the defendants.

Inhabitants of Tolland *vs.* County Commissioners of Berkshire.

By the Rev. Sts. c. 14, § 26, if the order of notice upon a petition to county commissioners for the repair of a highway is issued by a board of commissioners, one member of which resides in a town in which part of the highway lies, all subsequent proceedings are invalid, unless the irregularity is waived; and the presence, at the hearing upon the petition, of some citizens of a town, is no waiver of the irregularity on the part of that town.

Petition for a writ of *certiorari* to quash the proceedings of the county commissioners of Berkshire, ordering the rebuilding of the Belden Bridge and the repair of the Denslow Bridge across the Farmington River between the towns of Tolland in Hampden County and Sandisfield in Berkshire; and to restrain the execution of a warrant of distress issued by said commissioners against the town of Tolland.

This case was argued at Lenox at September term 1858, by *W. G. Bates*, for the petitioner, and *M. Wilcox*, (*G. J. Tucker* with him,) for the respondents, and judgment entered in Hampden at September term 1859. The facts necessary to the understanding of the decision are stated in the opinion.

Merrick, J. The validity of the warrant which the petitioners seek to restrain the respondents from enforcing depends upon the decision of the question whether the proceedings upon the petition of the inhabitants of Sandisfield for the rebuilding and repair of the Belden and Denslow Bridges were legal, and obligatory upon all parties in interest. That petition was presented to the county commissioners of the county of Berkshire, and notice of the time and place of the hearing to be had thereon was ordered by them, and the service of the order of notice was

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made returnable to Lemuel K. Strickland, chairman of the board. It appears from the agreed statement of facts that Mr. Strickland was then an inhabitant of, and resident within the town of Sandisfield. By § 26 of the Rev. Sts. *c.* 14, it is provided, among other things, that if the road, or any part of it, upon which the commissioners are to act, lies within a town within which one of them resides, the other members of the board shall give notice to one of the special commissioners, and he shall forthwith proceed to act in the board, and shall have the same authority in all respects as the county commissioner who is so disqualified. Under this provision it is plain that Mr. Strickland was disqualified to act upon the petition of the inhabitants of Sandisfield. His residence in that town was a positive disqualification: and until one of the special commissioners was called in, and assumed the discharge of his duties, there was no board legally constituted or competent to act upon the petition.

No notice was ever given, or directed to be given, except that which was ordered by the board when Mr. Strickland constituted one of its members, and as this was an order which the board so organized was not competent to make, the town of Tolland was never legally notified of the presentment or pendency of that petition, and was of course under no legal obligation to respond to it at the time and place fixed for the hearing. And as no sufficient foundation was laid by the notice emanating from such a source, for any future proceedings, whatever subsequently took place was erroneous and illegal, unless it was expressly, or, by a waiver of the objection which might have been insisted upon, impliedly assented to by the adverse party.

No doubt this objection was of such character that it might have been waived, and if it had been, either directly or indirectly, it could not, at any later stage in the proceedings, have been revived or interposed. *Kent* v. *County Commissioners*, 10 Pick. 521. The doctrine of waiver is founded upon a useful and reasonable principle, is of extensive application, and has been repeatedly recognized by this court as affording a sufficient rea-

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son for upholding proceedings which could not otherwise be sustained. *Simonds* v. *Parker*, 1 Met. 508. *Carpenter* v. *Aldrich*, 3 Met. 58. *Clark* v. *Montague*, 1 Gray, 446.

But in this case there is no proof whatever, and no evidence tending to establish the fact of a waiver of this objection by the inhabitants of Tolland. It is not shown by the record, nor by anything contained in the agreed statement of facts, that they ever appeared before the commissioners in pursuance of the notice ordered, or that they ever made themselves a party to, or were heard upon the prayer of the petition. It is stated in the record that "the petitioners and divers other citizens of the towns of Sandisfield and Tolland were present at the time and place fixed by the hearing;" but no mention is made of any appearance by the town of Tolland. Certain of the inhabitants of the town were indeed there, but they had no power or authority to represent the corporation or compromise its rights.

On the other hand, it is obvious that the town was, from the beginning, steadily opposed to the petition, and that there never was an intention on their part to concede advantages to the petitioners, or to yield or waive any rights or privileges to which they were entitled. They attempted to procure, and actually obtained, by an order of the commissioners of the county of Hampden, a discontinuance of one of the ways described in the petition, and an act of the legislature, by the terms of which the whole of the bridge upon the other was located within the limits of the town of Sandisfield. And in May 1855, before the commencement of any repairs upon the one, or of the reconstruction of the other bridge, they passed a vote at a legal town meeting, in which, among other things, they expressly protested that the order of the county commissioners of the county of Berkshire upon these subjects was illegal, informal and void, and that they recognized no obligation on their part to be bound by any proceedings which had taken place upon and under the petition. This vote was immediately afterwards communicated both to the county commissioners of the county of Berkshire, and to the inhabitants of Sandisfield. It is impossible, under such circumstances, to find that the inhabitants of Tolland waived

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or surrendered any of their rights, or gave up an objection which was material to their defence, and upon which they were entitled to insist.

As all the proceedings upon the petition were irregular and illegal as against the inhabitants of Tolland, it follows that the warrant which was subsequently issued against them for the amount of their alleged share of the cost and expense incurred in the repair and construction of the bridges is invalid. As this in substance is a definitive determination of the whole matter in interest between the parties in the present case, it is unnecessary to consider the other questions raised and discussed by the parties at the argument. *Writ of certiorari to issue.*

LYMAN M. MORTON *vs.* CHARLES RICHARDS & another.

A promise by a new partnership to an outgoing partner, to pay the debts of the old firm, creates no debt which he, upon their taking the benefit of the insolvent laws, and his being therefore obliged to pay one of those debts, can prove against their estate, under the St. of 1838, c. 163, § 3.

APPEAL from a decree of the judge of insolvency for the county of Hampshire, disallowing a claim of Morton against the estate of Johnson & Daniels, insolvent debtors. The case was this:

On the 4th of September 1857 Johnson and Morton, who had previously been in partnership together, sharing equally, agreed orally with Johnson that Morton should sell out his interest in the firm to Daniels, and that the new firm of Johnson & Daniels should take all the property and pay all the debts of the old firm of Johnson & Morton, and indemnify Morton against all his liabilities as a member of that firm; and Morton accordingly transferred all his interest, and withdrew from the firm.

In January 1858 Johnson & Daniels became insolvent, and

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applied, as a partnership and as individuals, for the benefit of the insolvent laws. Among the debts of the old firm, which they had not then paid, was one to Emmons, Danforth & Scudder of $675, which still remained an open account against Johnson & Morton, and was presented at the first meeting of the creditors of Johnson & Daniels for proof against the partnership estate of the latter, but was allowed against the separate estate of Johnson only, and was afterwards, upon notice to Morton that Emmons, Danforth & Scudder looked to him for payment, paid by him, and the proof withdrawn.

Morton then offered to prove against the estate of Johnson & Daniels for the amount so paid, but the judge of insolvency rejected the claim, and Morton appealed to this court, before whom this case was argued at Northampton at September term 1858.

S. T. Spaulding, for the appellant. The debt offered for proof arose under a contract made by Johnson & Daniels with the plaintiff. Being a promise to pay a debt from the promisee to a third person, it was not within the statute of frauds. *Preble* v. *Baldwin*, 6 Cush. 549. *Pike* v. *Brown*, 7 Cush. 136. *Alger* v. *Scoville*, 1 Gray, 391. *Eastwood* v. *Kenyon*, 11 Ad. & El. 438.

It was a specific debt of a certain amount, contracted and immediately payable by them. It was therefore a demand in existence, the cause of action upon which depended upon no contingency, and was provable against their estate. *St.* 1838, *c.* 163, §§ 3, 7. *French* v. *Morse*, 2 Gray, 111. *Loring* v. *Kendall*, 1 Gray, 314, 315, 317. *Johnson* v. *Ames*, 11 Pick. 182. *Brooks* v. *Moody*, 20 Pick. 474. *Bennett* v. *Bartlett*, 6 Cush. 225. *Prescott* v. *Trueman*, 4 Mass. 627. *Kelton* v. *Phillips*, 3 Met. 61. *Barker* v. *Mann*, 4 Met. 302. *Savory* v. *Stocking*, 4 Cush. 607. *Mann* v. *Houghton*, 7 Cush. 592. *Sleeper* v. *Miller*, 7 Cush. 594, *note*. Sedgwick on Damages, (2d ed.) 308–311, and cases there cited. 1 Saund. 116, *note* 1. *Holmes* v. *Rhodes*, 1 Bos. & Pul. 638, *& notes*. *Hodgson* v. *Bell*, 7 T. R. 97. *Port* v. *Jackson*, 17 Johns. 239, 479. *Thomas* v. *Allen*, 1 Hill, (N. Y.) 145. *Toussaint* v. *Martinnant*, 2 T. R. 100. *Martin*

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v. *Court*, 2 T. R. 640. *Mann* v. *Eckford*, 15 Wend. 502. *In re Negus*, 7 Wend. 499. *Lethbridge* v. *Mytton*, 2 B. & Ad. 772. *Loosemore* v. *Radford*, 9 M. & W. 657. *Parker* v. *Norton*, 6 T. R. 695.

Johnson & Daniels, as between themselves and Morton, were principal debtors; and this claim is therefore within the letter and intent of the *St.* of 1838, *c.* 163, § 3, allowing the proof of any sum paid "by any surety of the debtor on any contract whatever," although paid after the first publication of notice. *Arnold* v. *Lyman*, 17 Mass. 400. *Carnegie* v. *Morrison*, 2 Met. 381 *Mellen* v. *Whipple*, 1 Gray, 317.

C. Delano, for the assignees.

METCALF, J. The third section of the insolvent act, (*St.* 1838, *c.* 163,) describes the debts which may be proved and allowed against an insolvent debtor's estate, and declares that no debt other than those thus described shall be proved or allowed. Is the appellant's claim such a debt of Johnson & Daniels as is described in that section? The court are of opinion that it is not, and therefore that the judge of insolvency rightly refused to allow it. The first two kinds of debts described in that section are debts of the insolvent debtor, due and payable at the time of the first publication of notice that a warrant has issued against his estate, and debts then absolutely due, although not payable till afterwards. But the agreement of Johnson & Daniels to pay to Emmons, Danforth & Scudder the debt due to them from Johnson & Morton, and to indemnify Morton against his liability to pay it, did not create a debt from them to him of either of these two kinds. A promise to pay the promisee's debt, and to indemnify him against it, does not create a "debt due" to him from the promisor, in any legal sense of those words. It creates a contract for the performance of a future act, or future acts, by the promisor, and entitles the promisee to an action against him for a breach of that contract.

There is only one other kind of debt described in the third section of the insolvent act, to which the appellant has referred in support of his claim; namely, "the payment of any sum by

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any surety of the debtor in any contract whatsoever," although such payment shall be made after the first publication of notice that a warrant has issued against the debtor's estate. But the appellant was not a surety for the debt due to Emmons, Danforth & Scudder. He was a principal debtor, and in paying it he paid his own debt. A surety is he who becomes answerable, by contract with another, for the payment to him of a third person's debt, or for the performance of a third person's other undertaking or duty. In this case, Johnson & Daniels did nothing which rendered them answerable to Emmons, Danforth & Scudder, for the payment of Johnson & Morton's debt to them; *Dow* v. *Clark*, 7 Gray, 198; and if they had, that would not have made Morton their surety. See *Mayer* v. *Meakin*, Gow, 183.

Perhaps a claim like this, and sundry other claims, might well nave been made provable under the insolvent act of 1838. The court, however, cannot extend that act to any cases for which it has not in terms provided.

Decree of the judge of insolvency affirmed.

Otis Beals *vs.* Levi Clark & another.

A mortgage of a homestead exempted from levy on execution by *St.* 1855, *c.* 238, except for debts contracted before the passage of that act, if made with intent to give a preference contrary to the insolvent laws, is void as against the mortgagor's assignee in insolvency.

The intent to prefer a creditor in violation of the insolvent laws may be inferred from the fact of preference.

Writ of entry to foreclose a mortgage made by Levi Clark in October 1856, and in which his wife joined, of his homestead in Plainfield. The defendants were Clark, and his assignee in insolvency, who claimed title as such under proceedings commenced on the 16th of December 1856.

At the trial in the court of common pleas in Hampshire, before *Morris*, J., these facts were admitted: The value of the

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premises, when the mortgage was given, and at the time of the proceedings in insolvency, was $500. Debts to the amount of more than $700, contracted before the homestead act of 1855 took effect, were proved against the estate of Clark; but the plaintiff's mortgage note was not so proved.

The plaintiff asked the court to rule "that the demanded premises did not pass by the assignment; and that the mortgage was not a conveyance of such property as would constitute a preference void by the insolvent laws." But the court declined so to rule; and ruled "that said premises passed by the assignment; and that if the jury were satisfied, by the other evidence in the case, that said mortgage was made to secure a preëxisting debt from Clark to the plaintiff, and with intent to prefer the plaintiff as such creditor, Clark being at the time insolvent, and having reasonable cause to believe himself insolvent, and the plaintiff also having reasonable cause to believe it, the mortgage would be void as against the assignee, and the defendants entitled to a verdict; and that it was competent for the jury to infer the intent to prefer, from the fact of preference."

The jury returned a verdict for the defendants, and the plaintiff alleged exceptions, which were argued and decided at Northampton at September term 1858.

W. Allen, Jr. for the plaintiff. The property mortgaged was not property which could be distributed under the insolvent laws; and therefore the conveyance of it was not a preference, and it did not pass by the assignment in insolvency. Property "by law exempted from attachment" does not pass by an assignment under *St.* 1838, *c.* 163, § 5. See Rev. Sts. *c.* 90, §§ 23, 24; *St.* 1857, *c.* 298, §§ 16, 17. The provision in § 3 of *St.* 1855, *c.* 238, that "no property by virtue of this act shall be exempted from levy for any debt contracted previous to the passage of this act," does not affect this exception. The words "exempted from attachment" in the insolvent acts and in the assignment, are words of description, describing property exempt from attachment by general creditors. Those creditors can have distribution of that property only, which is liable for the general debts. If the property is subject to distribution in insolvency

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it must be distributed among the general creditors; assets cannot be marshalled between old and new creditors. *St.* 1838, *c.* 163, §§ 12, 13, 21. If the provision takes away the exemption, it must do so as to the whole homestead, and cannot be restricted to the amount of the debts for which it is so liable. See *St.* 1857, *c.* 298, § 17.

The instruction that the intent to prefer might be inferred from the fact of preference was wrong; because it does not appear that the fact of preference was known to the plaintiff. The conveyance was apparently no preference, and there is no presumption, from the fact that plaintiff accepted it, that he knew it to be a preference.

C. Delano, for the defendants.

METCALF, J. Clark's homestead rights were acquired under *St.* 1855, *c.* 238, and not under *St.* 1851, *c.* 340, because, under the last named statute, no one could acquire those rights, unless it was set forth in the deed conveying the property to him, or in a notice in the registry of deeds, that the property was designed to be held as a homestead. By the first named statute (§ 3) no homestead property is exempted from sale or levy on execution for any debt contracted by the owner before the statute was passed. In this case, the homestead property was of the value of five hundred dollars; and Clark, when he petitioned for the benefit of the insolvent laws, owed debts to the amount of seven hundred dollars, which were contracted before the passage of that statute. For those debts, therefore, the creditors might have levied executions on that property. It follows, that the property was not "by law exempted from attachment," by the first and fifth sections of the insolvent act of 1838, *c.* 163. *Woods* v. *Sanford*, 9 Gray.

There can be no doubt that Clark, by the mortgage to the plaintiff, executed as it was by his wife, released and conveyed all the homestead rights conferred on him and his family by statute. And the plaintiff would hold the property, disincumbered of those rights, if Clark's creditors would not be thereby defrauded. But the jury have found that the mortgage was made in fraud of the insolvent laws; that is, "with a view to

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give a preference" to the plaintiff over other creditors. As to those creditors it was therefore void, and was rightly assigned, by the judge of insolvency, to Clark's assignee.

The jury were rightly instructed that it was competent for them to infer, from the fact that Clark did give a preference to the plaintiff, that he intended to give it. *Denny* v. *Dana*, 2 Cush. 172.

Whether the mortgage is void as to creditors whose claims arose after the passage of *St.* 1855, *c.* 238, or only as to prior creditors, and how the mortgaged property, or the avails thereof, shall be distributed among the different creditors, are questions which, though discussed in argument, we cannot definitively settle in this action, and upon which we therefore intimate no opinion. That property is now rightly in the assignee's hands, and is to be appropriated, like all other assigned property of an insolvent debtor, according to the law which shall be found applicable to it. When either of the foregoing questions shall come before us, in a form proper for ultimate decision, they will be considered and determined. *Exceptions overruled.*

CHANDLER CLARK *vs.* SAMUEL POTTER.

The proviso in the homestead act of 1857, *c.* 298, § 18, that the repeal of the *Sts.* of 1850, *c.* 238, and *St.* 1851, *c.* 340, "shall not affect any rights acquired under said acts," protects rights of homestead exemption conferred by the *St.* of 1855, *c.* 298, without their being recorded as required by *St.* 1857, *c.* 298, § 3.

An insolvent debtor, entitled to a homestead under the *St.* of 1855, *c.* 238, and owing debts contracted before the passage of that act to an amount of less than $800, is entitled to have set off to him a homestead of the value of $800, deducting the amount of such debts.

PETITION under the *St.* of 1838, *c.* 163, § 18, to this court, sitting in equity in Franklin at April term 1858, to revise a decree of the judge of insolvency, refusing to set off a homestead to the petitioner, under *St.* 1857, *c.* 298, § 17.

The land in question was of greater value than $800, and was owned and occupied as a homestead by the petitioner, who

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was a householder having a family, ever since the 1st of May 1851, which was before the passage of the *St.* of 1851, *c.* 340; but his design to hold the premises as a homestead was not set forth in his deed of purchase, nor since declared by deed acknowledged and recorded. On the 2d of November 1857 proceedings in insolvency were commenced against him, and his property assigned by the judge of insolvency to the respondent. Some of the debts proved against his estate, to the amount of less than $800, were contracted before the passage of the *St.* of 1855, *c.* 238.

The petitioner claimed to be entitled to hold as a homestead, under the *St.* of 1855, *c.* 238, a part of the premises, to the value of $800, or at least that value after deducting the amount of said debts contracted before the passage of that statute. *Dewey*, J. reserved the case, upon these facts, for the consideration of the full court, before whom it was argued at Northampton at September term 1858.

W. Griswold & S. O. Lamb, for the petitioner.

C. Allen, for the assignee. The intent of the *St.* of 1857, *c.* 298, was to revive the policy of the *St.* of 1851, *c.* 340, and require registration of the intent to hold land as a homestead in all cases. Section 3 of the *St.* of 1857, *c.* 298, expressly declares that, to entitle any estate to exemption as a homestead, it shall be set forth in the deed of purchase that it is designed to be so held; "or, if already purchased or otherwise acquired, the said design shall be declared by writing duly sealed, acknowledged and recorded."

If the proviso in § 18, of *St.* 1857, *c.* 298, that the repeal of *Sts.* 1855, *c.* 238, and 1851, *c.* 340, "shall not affect any rights which may have been acquired under said acts," applied to rights of exemption which the debtor had without record under the *St.* of 1855, *c.* 238, it would be contrary to the general intent of the law, and the express language of § 3.

If that proviso refers to the debtor's rights of exemption at all, it refers only to such rights "acquired," that is, by purchase or descent; not to those created and conferred by law, without any act of the party or other event.

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But it is rather to be confined to the rights of creditors, and perhaps those of his wife and children. The similar proviso in the *St.* of 1855, *c.* 238, § 7, repealing *St.* 1851, *c.* 340, could not apply to rights of homestead previously existing; for they were all enlarged and increased, instead of being restricted, by the other provisions of that act.

In this case, the existence of debts contracted before the passage of the act of 1855 destroys the right of redemption.

Dewey, J. The premises which the petitioner seeks to have set off to him as a homestead, to be by him and his family enjoyed as such, and exempt from liability to be taken for the payment of his debts, by his assignee duly appointed under proceedings in insolvency, were owned and occupied by him as a residence, he being a householder and having a family, prior to the passage of the earliest statute exempting from levy on execution the homestead of a householder having a family, and have continued to be so occupied to the present time. But the petitioner acquired no rights under the *St.* of 1851, *c.* 340, as he had not complied with the requirements of § 3 of that act, that such design to hold the same as a homestead should be declared by writing, duly sealed and acknowledged, and recorded in the registry of deeds. His present claim arises under the *St.* of 1855, *c.* 238, containing much broader provisions, and creating an exemption of a homestead, without any declaration by the party of such purpose by a writing sealed, acknowledged and recorded. Under the provisions of this statute, the right existed in the petitioner to have his homestead, to the value of eight hundred dollars, exempted from liability for his debts, except such as were contracted previously to the passage of this statute.

But this statute has been repealed by *St.* 1857, *c.* 298, which has reënacted the provisions of *St.* 1851, *c.* 340, § 3, requiring a written declaration and record thereof in the registry of deeds to entitle the party to the exemption of a homestead. The *St.* of 1857 has however a saving clause to such repeal, in these words, "provided that such repeal shall not affect any rights which may have been acquired under said acts," referring to both the previous statutes.

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The questions to be settled are, whether, as to every person owning and occupying a residence as a householder and head of a family, between the periods of May 27th 1855 and June 30th 1857, the homestead right conferred by the *St.* of 1855, *c.* 238, continues in full effect; and whether, without any such declaration of purpose or record as is required by the *St* of 1857, *c.* 298, the same may be set up and enforced against all subsequent creditors or purchasers by conveyance from the husband, without the wife joining as a party to the conveyance.

On the part of the respondent, it is contended that the purpose of the statute of 1857 was to reinstate in all cases the provision for evidence of the intent to hold the property exempt as a homestead, and to confine the exemption for the future to such cases only. That it was competent for the legislature to take away this exemption, or to require those who would continue to enjoy it to record such purpose, so that the examination of the public records would give notice to a purchaser or creditor, I suppose cannot be questioned. Whether they have done so must depend upon the construction given to the proviso already quoted.

On the one hand, it may be strongly urged that as a system it would be more simple, uniform and certain to adopt the construction that it was so intended, making in all cases the registry of deeds an unfailing source of evidence of the claim of a homestead exemption by the party occupying the premises.

On the other hand, it is said that the only reasonable and practical application that can be given to this proviso is, to exempt from the operation of the *St.* of 1857 all homestead rights created by virtue of the *St.* of 1855. A similar proviso was attached to the *St.* of 1855, *c.* 238, § 7, repealing the act of 1851. Its application in that case seems very difficult, as the *St.* of 1855, by its very terms, gave a homestead in all the cases in which they were given by the *St.* of 1851, and only omitted the requisition of a written declaration and record. In the *St.* of 1857, it may have a very palpable and direct application, if we construe it as intended to reserve all homestead rights that had attached to any real estate by virtue of the ac

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of 1855. Upon carefully examining the *St.* of 1855, it will be difficult to find any other rights that could have accrued thereby except the homestead exemption now claimed. The more natural and obvious construction of this proviso being that we have suggested, that of unlimited exemption from the provisions of the statute, of all homestead rights, then existing, that had been created by virtue of the *St.* of 1855, we feel required to give effect to it, thereby holding that the petitioner had a right to have a homestead exempted, as provided in the *St.* of 1855.

The further inquiry is, whether this petition can be maintained, inasmuch as it appears that there are outstanding debts of the petitioner, contracted prior to the passage of the act of 1855; and as to such debts, by the terms of the act, the exemption of the homestead cannot avail. This objection is fatal to the petitioner, unless it is competent to set off a limited homestead to the party thus indebted for prior debts to a less amount than eight hundred dollars, such homestead not exceeding in value the difference between the preëxisting debts and eight hundred dollars. This might be done, and seems to be the only way to carry out practically the purposes of the statute. There are however no direct provisions authorizing such form of proceeding, and if adopted, it must be because of its fitness to give effect to the statute. To the extent of the debts existing before the passage of the act of 1855, the homestead privilege must yield, as the assignee takes all the property of the debtor that was subject to levy of execution, and this was thus subject. *Beals* v. *Clark*, *ante*, 20. But as to what remains, the homestead exemption may be still operative.

The result will be that the prayer of the petition must be so far granted as to require the proper proceedings to ascertain the amount of debts existing prior to the passage of the *St.* of 1855, *c.* 238; and after that amount is deducted from eight hundred dollars, the residue is to be set off from the estate occupied by the petitioner as a homestead, and to be held and enjoyed by him and his family agreeably to the provisions of the statute.

Decree accordingly

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COMMONWEALTH *vs.* DANIEL HOWE.
SAME *vs.* HIRAM H. AMES.
SAME *vs.* LYDIA A. BARNES.

The *St.* of 1855, *c.* 405, § 1, declaring all buildings, places or tenements used for the illegal sale or keeping of intoxicating liquors to be common nuisances, and to be regarded and treated as such, is constitutional.

An indictment on *St.* 1855, *c.* 405, § 1, which avers that the defendant at a certain time and place "did keep and maintain a common nuisance, to wit, a certain tenement," (described) "then and there used as a house of ill fame, resorted to for prostitution and lewdness, for illegal gaming, and also then and there used by the defendant for the illegal sale and illegal keeping of intoxicating liquors," need not conclude "to the common nuisance of all the citizens," &c.

After conviction on an indictment containing several counts for the same offence, only one of which is sufficient, judgment may be rendered on that count.

An indictment for unlawfully keeping a tenement in violation of *St.* 1855, *c.* 405, § 1, is supported by proof of the use of any part of the tenement for the purpose, although it consists of several rooms.

An indictment on *St.* 1855, *c.* 405, § 1, which avers that the defendant kept and maintained a certain tenement, used for the illegal sale and illegal keeping of intoxicating liquors, whereby, and by force of the statute in such case made and provided, the said tenement so kept, maintained and used, was then and there a common nuisance, to the common nuisance, &c. sufficiently avers that the tenement was a nuisance.

A party has no right of exception to the refusal of the judge presiding at a trial to instruct a witness that if he would avail himself of his right to refuse to answer interrogatories, on the ground that the answers might criminate him, he must make the objection before answering anything upon that subject.

INDICTMENTS on *St.* 1855, *c.* 405, § 1. The two first were tried in the court of common pleas for Worcester at May term 1858, before *Mellen*, C. J., and the exceptions to his rulings argued at October term 1858 at Worcester.

The indictment against Howe contained two counts, one of which alleged that the defendant at Worcester, during certain times, "did keep and maintain a certain tenement there situate, called and well known as the 'Lone Star Saloon,' and used as a house of ill fame, resorted to for prostitution and lewdness, for illegal gaming, and for the illegal sale and illegal keeping of intoxicating liquors, then and there, on the days and times aforesaid, to the great injury and common nuisance of all the peaceable citizens of said commonwealth there residing, inhabiting and passing;" and the other alleged that the defendant at the same time and place "did keep and maintain a common nuisance, to

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wit, a certain tenement called the 'Lone Star Saloon,' situate on the southerly side of Washington Square, so called, in said Worcester, and then and there used as a house of ill fame, resorted to for prostitution and lewdness, for illegal gaming, and said tenement was also then and there used by said Howe for the illegal sale and illegal keeping of intoxicating liquors."

Howe, after conviction, moved in arrest of judgment, 1st because the *St.* of 1855, *c.* 405, § 1, was unconstitutional and void; 2d, because the first count did not clearly allege that the defendant kept a tenement used for the illegal sale or keeping of intoxicating liquor, but only that the defendant's tenement was resorted to for that purpose; 3d, because the second count was bad, in not clearly alleging that the defendant kept or maintained the tenement used for the illegal sale or keeping of intoxicating liquor, to the common nuisance of all the citizens there inhabiting, being and residing. This motion was overruled, and the defendant excepted.

E. B. Stoddard, for Howe, in support of the third ground of the motion, cited *Commonwealth* v. *Smith*, 6 Cush. 80; *Commonwealth* v. *Kimball*, 7 Gray, 328.

The indictment against Ames charged him with keeping and maintaining "a certain common nuisance, to wit, a certain tenement situate on the east side of Main Street in said Worcester, called and known by the name of the 'Eagle Saloon,'" then and there used by him for the illegal sale and illegal keeping of intoxicating liquors.

So much of Ames's bill of exceptions as concerned the points argued in this court was thus: "At the trial the defendant asked the court for the following instructions to the jury: 1st, that the statute under which this indictment is founded is unconstitutional and void; 2d, that the evidence did not support the allegation in the indictment, to wit, the keeping of the Eagle Saloon, as it only tended to show that one room of said saloon, consisting of four or more rooms, was used for that purpose. The court refused so to instruct the jury, but instructed them, 1st, that the act under which this indictment was found was constitutional; 2d, that if any portion of the premises known as

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the Eagle Saloon was used for the illegal sale or keeping of intoxicating liquor, it would be sufficient to support the indictment."

G. F. Verry, for Ames, in support of the second exception, cited *Commonwealth* v. *Mc Caughey*, 9 Gray, ; *Commonwealth* v. *Hall*, 15 Mass. 240; *State* v. *Sturdivant*, 21 Maine, 9.

In the third case, the indictment averred that Lydia A. Barnes at Taunton, during a certain time, "did keep and maintain a certain tenement, then and there used as a house of ill fame, resorted to for prostitution and lewdness, and for illegal gaming, and then and there used for the illegal sale and illegal keeping of intoxicating liquors; whereby, and by force of the statute in such case made and provided, the said tenement, then and there kept and maintained by the said Lydia A. Barnes, and then and there used and resorted to as aforesaid, was then and there a common nuisance; to the great injury and common nuisance of all the peaceable citizens of said commonwealth there residing, inhabiting and passing, against the peace and dignity of said commonwealth, and contrary to the form of the statute in such case made and provided." Trial in the court of common pleas in Bristol at June term 1858, before *Sanger*, J., who signed this bill of exceptions:

"Upon the trial of this cause, the government put upon the stand a witness who had been an inmate of the house described in the indictment during the time, or a portion of the time, covered by the indictment. The counsel for the defendant, before any questions had been put by the district attorney to the witness, requested the court to instruct the witness that if she would avail herself of her right to refuse to answer interrogatories, on the ground that the answers might criminate herself, she must make the objection to answering at the time when she was inquired of relating to any subject matter upon which, if she were examined in full, her answers would tend to criminate her; otherwise, if she answered any questions touching said subject matter, she would be held to have waived her privilege, and would be obliged to answer in full. This instruction the court declined to give.

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"Afterwards, in the progress of the examination of said witness, she was asked by the district attorney if she paid board to the defendant. The witness replied that she declined to answer. She was asked by the court on what ground she declined to answer; she replied she did not like to tell it right out before everybody. Thereupon the court, at the request of the defendant's counsel, requested the witness to leave the court room, and during her absence the defendant's counsel renewed the request to the court for instructions to the witness. Again the court declined to give them. Upon the return of the witness, she answered, without objecting, the questions put by the district attorney.

"The witness had previously testified in a case in which the witness' position and conduct in the defendant's house, during a portion of the period embraced in the indictment, had been made the subject of inquiry; and in her replies to some questions then put, and in declining to reply to other questions, had exhibited, in the opinion of the court, a knowledge of her legal rights as a witness.

"The defendant put no questions to the witness in cross-examination. The jury found the defendant guilty. To these refusals the defendant excepts."

Barnes also moved in arrest of judgment, because the statute was unconstitutional; and because there was no sufficient averment that the tenement in question was a common nuisance, or that the defendant kept and maintained a common nuisance. This motion being overruled, she again excepted, and her exceptions were argued at Taunton at October term 1858.

C. I. Reed, for Barnes, to the point, that the averment of common nuisance was argumentative and bad, and a mere statement of a conclusion of law, cited 1 Chit. Pl. (6th Amer. ed.) 539, and cases cited; *Atwood* v. *Caswell*, 19 Pick. 493; *Austin* v. *Parker*, 13 Pick. 222; *Bean* v. *Farnam*, 6 Pick. 269; Steph. Pl. (1st Amer. ed.) 384, and cases cited; *Sutcliffe* v. *Constable*, Yelv. (Amer. ed.) 223; Bac. Ab. Pleas & Pleadings, I, 5; Archb. Crim. Pl. (5th Amer. ed.) 48, 54; 1 Chit. Crim. Law, 237; *Rex* v. *Knight*, 1 Salk. 375; *The Queen* v. *Goddard*

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3 Salk. 171; *The Queen* v. *Collingwood*, 3 Salk. 42; and to the exception to the refusal to instruct the witness, *Commonwealth* v. *Kimball*, 24 Pick. 359; *Foster* v. *Pierce*, 11 Cush. 438; *Commonwealth* v. *Shaw*, 4 Cush. 594.

The reasons urged against the constitutionality of the statute were these: By the *St.* of 1855, *c.* 405, § 1, buildings or tenements used for the illegal sale or keeping of intoxicating liquors are "declared to be common nuisances, and are to be regarded and treated as such." It does not even require a knowledge of the unlawful use on the part of the owner. If they are common nuisances, they may be destroyed and abated by any one, without first judicially ascertaining whether the circumstances exist which are declared unlawful. 1 Russell on Crimes, (7th Amer. ed.) 328. Bac. Ab. Nuisances, C. 1 Hawk. *c.* 75, § 12. 1 Bishop Crim. Law, § 700. *Wales* v. *Stetson*, 2 Mass. 146. *Arundel* v. *M'Culloch*, 10 Mass. 70. *Baker* v. *Boston*, 12 Pick. 193. *Commonwealth* v. *Alger*, 7 Cush. 53. But the legislature cannot provide for the destruction of any recognized species of property, without giving an opportunity to the owner to protect his property, in proceedings in due course of law. Declaration of Rights, art. 12. *Fisher* v. *McGirr*, 1 Gray, 27, 28, 32. 2 Kent Com. (6th ed.) 13. Story on U. S. Const. § 1783. Sedgwick on Stat. & Const. Law, 514. *People* v. *Toynbee*, 20 Barb. 168. *Wynehamer* v. *People*, 3 Kernan, 378.

S. H. Phillips, (Attorney General,) for the Commonwealth.

The decision of these cases was postponed until the case of *Brown* v. *Perkins* should have been argued, which was in fact argued in Essex at November term 1858, and judgment in it entered at May term 1859. 12 Gray.

Metcalf, J. We do not find anything unconstitutional in the statute on which these indictments are founded.

Howe's motion in arrest of judgment was rightly overruled. There certainly is reason for doubting whether the first count sufficiently alleges that the defendant kept and maintained a tenement used for the illegal keeping and illegal sale of intoxicating liquors. But we need not decide that question; for the second count, which is for the same offence, alleges that the ten-

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ement was kept, maintained and used by the defendant for the illegal keeping and illegal sale of such liquors. And as that count also alleges that the defendant "did keep and maintain a common nuisance, to wit, a certain tenement" used for purposes which by the statute make it a common nuisance, it was unnecessary that the count should conclude *ad commune nocumentum.* Such conclusion would have been superfluous repetition.

Assuming that the first count is insufficient, yet judgment should be rendered on the second count, which we have found to be sufficient. *Commonwealth* v. *Hawkins*, 3 Gray, 463.

In the case of Ames, we do not perceive any material variance between the allegation and the proof of the place used by the defendant for the unlawful keeping and unlawful sale of intoxicating liquors.

In Barnes's case, the indictment is in the form that has been used in previous cases, and been repeatedly sustained by this court. *Commonwealth* v. *Kimball*, 7 Gray, 328. *Commonwealth* v. *Kelley & France*, 7 Gray, 332, *note.*

The refusal of the judge, on motion of the defendant's counsel, to instruct a witness as to her right to decline to answer interrogatories, on the ground that her answers might criminate her, was well warranted, we think, by the decision in *Commonwealth* v. *Shaw*, 4 Cush. 594. *Exceptions overruled.*

Willard Brown *vs.* City of Worcester.

A provision, in the location of a highway by county commissioners, that the owner of a house, part of which comes within the location, "is to have the privilege to have his house remain as it is, and not to be required to remove it until he, his heirs or assigns have occasion to rebuild or remove it," does not prevent him from claiming damages for the expense of removing it, if rendered expedient by the location, or from claiming damages for injuries occasioned to it by such location.

A conveyance of land adjoining land of the grantor, and bounded on the same street, "with a right of way in the street to a street" on the other side of the grantor's land, and a covenant that the street on which the land is bounded shall be of a certain width as far as the granted land extends, is no evidence of an agreement of the grantor to dedicate to the public a strip necessary to make the street of the same width throughout its length.

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Brown v. City of Worcester.

Evidence that a grantor, at the time of making conveyances of lands bounded upon street, said to his grantees that he should not throw out a strip of his own land into the street then, but should "eventually throw it out all the way," does not show a dedication of the land to the public.

At a hearing for the assessment of damages occasioned by the location of a highway, a witness, called to testify to the value of land taken on one side of the highway, may be asked on cross-examination concerning the value of land upon the opposite side of the way, although the jury have not had their attention called to land upon that side

The burden of proving a waiver of damages by one whose land has been taken for a highway is on the party alleging the waiver.

PETITION to the county commissioners for a jury to assess the damages sustained by the petitioner by the taking of his land in the location of Orange Street, in Worcester. A trial was had before the sheriff, who certified to the court of common pleas the following rulings:

The record of the mayor and aldermen showed that the easterly line of the location of Orange Street passed under the petitioner's house in such a way as to cut off the southwest corner of the house to the depth of three feet and ten inches, and running thence to a point in the northwest corner, and contained this provision: "As a corner of said Willard Brown's house comes within the location of Orange Street as herein described, the location is made with the understanding that the said Brown is to have the privilege to have his house remain as it is, and not to be required to remove it until he, his heirs or assigns have occasion to rebuild or remove it, and no longer."

The petitioner called James S. Woodworth, a witness qualified to testify on this subject, and asked him "if he had made an estimate of the expense of moving the dwelling-house of Brown eastwardly from off said location, so far as it would be necessary to have it moved in consequence of the laying out of said Orange Street." But the sheriff, at the request of the respondents, excluded the evidence; on the ground that Brown, by the provision in the location, had the right to have his house remain as it was, and, not being required by law to move it, was not entitled to any damages for removing it.

Orange Street extended from Plymouth Street on the south to Park Street on the north, at the corner of which was the petitioner's land. The respondents contended that the petitioner,

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before the location, had dedicated to the public the land over which the street was located; and also, by certain conveyances of house lots on the east side of the street, "had obligated himself to his grantees to throw out into said Orange Street, as a part of said street, all that portion of his land covered by the location;" and, to sustain this last position, offered in evidence two deeds from the petitioner; one to James A. Whipple, of a lot of land next south of the petitioner's land, and on the same side of Orange Street, described as "lying on the southeasterly side of Orange Street," "with a right of way in said Orange Street;" and the other to Stephen Bartlett, of the lot of land next south of Whipple's, described as "lying on the southeasterly side of Orange Street," "with a right of way in said Orange Street to Park Street; said Orange Street to be thirty seven feet wide from Plymouth Street to" the northwesterly corner of Whipple's land. It was agreed that, at the time of the conveyances to Whipple and Bartlett, Orange Street, which was then and down to the time of this location a private street, was thirty feet wide at its junction with Park Street, and gradually widened until it reached the north line of the land conveyed to Whipple, and thence continued of the width of thirty seven feet to Plymouth Street. By this location, no part of the land of Whipple and Bartlett was taken; but a strip of land claimed by the petitioner, extending from Whipple's land to Park Street, of the width of four feet at the south end, and three feet on Park Street, was taken, which strip of land had always been inclosed and occupied by the petitioner. The petitioner objected to the introduction of the deeds to Whipple and Bartlett; but the objection was overruled, and the deeds were read to the jury.

The respondents were permitted, against the petitioner's objection, to introduce the testimony of Bartlett and Whipple to statements of the petitioner in conversation with them, before and at the time of said conveyances, that he should not throw out this strip of land into the street then, but should "eventually throw it out all the way."

Upon these points, the sheriff instructed the jury "that if they were satisfied that the petitioner, in his deeds to Whipple

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and Bartlett, fixed the east line of Orange Street four feet further east than the line was before he made his conveyances to Whipple and Bartlett, they are entitled to have that line extended to Park Street, cutting off four feet of said Brown's land all the way, and widening the street to that extent, and that under such circumstances said Brown ought not to recover of the city for the land taken by the city, provided that no more than the four feet was taken." The petitioner excepted to this instruction, and requested that the jury be instructed "that if Brown, in his deeds to Bartlett and Whipple, fixed the east line of Orange Street, in front of their lots, and as the street extended south to Plymouth Street, four feet further east than it was before, it did not follow that they had the right to have the east line fixed four feet further east on that part of Orange Street extending in the other direction towards Park Street;" which instruction the sheriff declined to give.

The respondents also contended that the petitioner had waived all his claim to damages, and offered evidence that at the meetings of the mayor and aldermen, when the subject of locating Orange Street was under consideration, it was stated that the petitioner claimed no damages; but there was conflicting evidence whether the petitioner was present when this statement was made. The respondents also offered the testimony of one of the aldermen, that at these meetings he never heard the petitioner make any claim for damages. The petitioner objected to evidence of any statement made at meetings of the mayor and aldermen, unless it appeared that he was present; but the sheriff admitted the evidence; and ruled that the petitioner was not to be affected by any statements not made in his presence and hearing; and instructed the jury "that they must be satisfied beyond a reasonable doubt that a waiver of damages was made by Brown himself, or by some one authorized by him to make it, and that it applied to the location established by the decree, or it could not avail to cut off his claim to damages."

The jury returned a verdict for the respondents, which was accepted by the court of common pleas, and the petitioner appealed to this court.

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This case was argued at Worcester at October term 1858.

F. H. Dewey & H. Williams, for the petitioner, to the point that the mayor and aldermen had no power to make the provision in the location for the house remaining in its place, and that the petitioner might recover the expenses of removing it, cited Rev. Sts. *c.* 24, §§ 66–78; *Hyde* v. *County of Middlesex*, 2 Gray, 267; *Commonwealth* v. *King*, 13 Met. 115; *Commonwealth* v. *Weiher*, 3 Met. 445; and to the point that the deeds of Whipple and Bartlett were not evidence of the dedication of land to the public, 2 Greenl. Ev. § 662; *Hobbs* v. *Lowell*, 19 Pick. 405; *Noyes* v. *Ward*, 19 Conn. 250; *Cincinnati* v. *White*, 6 Pet. 431.

P. C. Bacon & P. E. Aldrich, for the respondents, to the point that the mayor and aldermen had power to make the provision in the location respecting the petitioner's house, cited Rev. Sts. *c.* 24; *St.* 1848, *c.* 98; to the point that the petitioner, by the terms of his deeds, had bound himself to throw the piece of land in question into the highway, *Parker* v. *Smith*, 17 Mass. 413; and to the point that the declarations of the petitioner to Bartlett and Whipple were admissible to prove a waiver of damages, *White* v. *County Commissioners*, 2 Cush. 361.

Dewey, J. In the opinion of the court this verdict must be set aside, upon various grounds of objection to the rulings of the sheriff.

1. The order of the county commissioners in making the location, containing the following provision, "As a corner of said Willard Brown's house comes within the location of Orange Street as herein described, the location is made with the understanding that the said Brown is to have the privilege to have his house remain as it is, and not to be required to remove it until he, his heirs or assigns have occasion to rebuild or remove it, and no longer," does not prevent the petitioner from claiming damages for the necessary expense of removing said house, if rendered expedient by reason of such location, or for the injury to the same occasioned by the location of the road. So far as the location of this road embraced any part of this house, it was an absolute location, and might be treated as such by the peti

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tioner, and he was entitled so to act upon it in reference to such house.

2. The ruling of the sheriff excluding the testimony of Woodworth, as to the expense that would be incurred by a removal of such house from the limits of the newly located road, was also erroneous.

3. The deeds to Whipple and Bartlett do not show that, by these conveyances, the petitioner had obligated himself to his grantees to surrender and yield up as a part of Orange Street all that portion of his land covered by the location of this way, or that they are entitled to have a line extended to Park Street, cutting off four feet of Brown's land, and widening the street to that extent.

4. The testimony of Stephen Bartlett, as to the declaration of the petitioner when speaking of the strip of land on the east side of Orange Street, "I shall not now throw it out, but I shall eventually throw it out all the way," does not show a dedication of this land to the public; nor does the testimony of James A. Whipple establish any such dedication.

5. As a matter of cross-examination, it was competent for the petitioner to ask a witness called by the respondents to testify to the value of the petitioner's land, what was the value of the land on the west side of Orange Street, although the jury might not before have had their attention directed to the land on that side of the street.

It may be proper to add, in reference to the future hearing, that it was competent for the defendants to submit to the jury any proper evidence tending to show that the petitioner had, prior to the location of the road and with a view of securing the same, waived all claim for damages to his land and buildings occasioned by such location. This must be shown affirmatively by those who rely upon it as a bar to all claim for damages.

Verdict set aside.

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COURTNEY SCHENCK & others *vs.* MILTON M. SAUNDERS.

A in New York and B in Massachusetts made this agreement in writing: "A agrees to furnish stock of sufficient amount to make at least eight and not to exceed twenty cases of boots per week; and B is to take the stock, and make it up to the best of his abilities into boots, and to consign all the boots he makes to A, to be sold by him on a commission of five per cent., the goods to be sold for cash, and the returns made to B as fast as made, and B agrees to put up and ship to A at his store in New York at least eight cases of boots per week." *Held*, that the title in stock sent by A to B under this agreement did not pass to B, although accompanied with bills of parcels in common form; and that A might reclaim boots made by B out of this stock from one who had received them from B to secure advances made by him to B thereon after being shown the agreement and bills of parcels.

ACTION OF TORT for the conversion of sundry cases of boots and shoes. The defendant in his answer denied the conversion and the plaintiff's property, and alleged that the goods were the property of Charles Howe, and by him consigned to the defendant for sale, who had made advances thereon to Howe beyond the value of the goods.

At the trial in the court of common pleas in Worcester at August term 1858, before *Morris*, J., it appeared that the plaintiffs were commission merchants and manufacturers of boots and shoes, under the firm of Schenck, Wood & Pond, having their principal place of business in New York, but were accustomed to put out stock to different persons in the states of New York, Connecticut and Massachusetts, to be manufactured into boots and shoes; and that on the 11th of April 1856 they made with Charles Howe of Framingham in this commonwealth a written agreement in these terms:

"The said Schenck, Wood & Pond of the first part agree to furnish stock, consisting of upper and sole leather and linings and bindings, of sufficient amount to make at least eight and not to exceed twenty cases per week. And the said Charles Howe of the second part is to take the stock, and make it up to the best of his abilities into women's boots; and further agrees to consign all the goods he makes to the said Schenck, Wood & Pond of the first part, to be sold by them on a commission of five per cent. — the goods to be sold for cash, and the returns

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made to the said Charles Howe as fast as made. And the said Charles Howe of the second part agrees to put up and ship to the said Schenck, Wood & Pond, at their store in New York, at least eight cases of boots per week, each case containing sixty pairs, commencing the first week in May 1856."

The plaintiffs proved that certain leather and stock suitable to be made into boots and shoes were delivered by them to Howe, and by him made up into the boots and shoes now in controversy, and taken to Boston and delivered to the defendant, who was an auctioneer and commission merchant there, and who sold them after the date of the writ.

The plaintiffs contended that by the terms of the written contract, apart from any evidence of usage, the leather and stock were delivered to Howe to be manufactured into boots and shoes, and were to be returned to them by Howe to be sold on commission, and never became the property of Howe under that contract, but remained in them; and that the boots and shoes manufactured by Howe, out of the stock and materials so delivered to him by them, were the property of the plaintiffs, and so continued up to the time they were received by the defendant in Boston.

The plaintiffs, after introducing the written contract, were allowed by the presiding judge, the defendant objecting, to give evidence "that there exists a general, well known usage of this trade, by which a commission merchant supplies or delivers stock, and the manufacturer agrees to return or consign to him the manufactured article for sale on commission, and that by said usage the property remains in the commission merchant in all the stages of manufacture; that such contracts, verbal and written, are very numerous, and well known to the trade; that they exist alike when the manufacturer is paid by the pair, and when he is paid by a share in the profits, or by the whole profits after commissions and cost of stock are refunded to the merchant; that the terms 'furnish' and 'consign' are customary in such contracts, and that neither of them imports any transfer of property to the manufacturer in either stock or goods."

The defendant contended that the property in the stock deliv-

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ered by the plaintiffs to Howe under this contract passed to Howe; and introduced evidence tending to show that whenever the plaintiffs sent stock to Howe, they sent him, within a few days afterwards, bills (not signed by the plaintiffs) in this form:

"Boot, Shoe and Leather Warehouse. New York, May 15th 1856. Mr. Charles Howe Bought of Schenck, Wood & Pond, Manufacturers and Commission Merchants, No. 25 Beekman Street. Terms 6 months.

"52 sides sole leather B. A.	644	26¼	170	66
"Inspection and cartage				90
			$171	56"

The defendant also introduced evidence tending to show that when Howe brought the boots and shoes now in controversy to the defendant in Boston, he showed the defendant said agreement, and thirty or forty of the bills sent him by the plaintiffs, of the above form, except in omitting in some of them, the words, "Terms 6 months;" and that the defendant, after reading the agreement and looking over the bills, made advances to Howe on the goods, believing that Howe owned them.

The defendant also introduced evidence controverting the usage set up by the plaintiffs, and asked the court to instruct the jury "that the custom must be one well known to the parties, or so general and long continued amongst all those of the trade and so well known that it might be presumed to have been known to the parties, and to have been adopted by them in the making of the contract;" and "that if they found the custom contended for by the plaintiffs to exist, so far as it respected the form of the contract, or exclusive of the matter relative to the bills of sale, and if they found that the plaintiffs had furnished Howe with bills of sale, thus enabling him to hold himself out as the owner of said stock and goods made therefrom, and that Howe did show them to the defendant, and the defendant, relying on the said bills of sale, and believing from an inspection of them that Howe was the owner of the goods, actually advanced money upon them, then the plaintiffs would be estopped from setting up a title to the goods, even though they had never sold them to Howe, and although the defendant

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was shown the written agreement and read it before advancing on the goods."

But the court declined so to instruct the jury, and instructed them "that, if compelled to interpret this contract by its own terms, without any extraneous evidence, the court would construe it as transferring the property to Howe, because the use of the word 'consign,' and the provision that the plaintiffs should sell the goods on a commission and render to Howe an account of sales, imported ownership in Howe rather than in the plaintiffs; but, in the opinion of the court, the contract was so indefinite and uncertain upon this point, as to render it proper to admit evidence of the usages of the trade to aid in giving a construction to the language of the parties to it; and if the plaintiffs had satisfied the jury that there existed in this trade a usage, as claimed by them, general, well established and known to the trade, so that it might fairly be presumed that the parties to this contract had reference to it, by which the merchant supplies the manufacturer with stock, and the manufacturer returns the manufactured goods to the merchant to be sold on commission, the merchant accounting to the manufacturer for the proceeds, the stock remaining in all stages of the manufacture the property of the merchant, and that in such transactions the word 'consign' is in customary use to denote merely the return of the goods to be sold, then, interpreting this contract in the light of such a usage, there was nothing in it which would operate to transfer the property in the stock from the plaintiffs to Howe, and if the plaintiffs delivered the stock to Howe under the contract, as the defendant contended, then the sending of unsigned bills of sale, if intended merely as memoranda, and not to transfer the property, would not have the effect to change the title, but it would still remain in the plaintiffs, and the defendant would be liable for a conversion; and that if the defendant had before him the contract and bills of sale when he made the advances, and knew all the facts upon which the title of Howe depended, he was bound to know what the legal effect of the contract was, and could not now avail himself of it, or of the bills of sale, by way of estoppel"

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The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions, which were argued at Worcester at October term 1858.

P. E. Aldrich, (*P. C. Bacon* with him,) for the defendant.

D. Foster & G. F. Verry, for the plaintiffs.

BIGELOW, J. The only title to the property in controversy which the defendant sets up is derived under the agreement made by the plaintiffs with Howe. This title he cannot maintain.

In the first place, taken in the most favorable view for the defendant, the agreement is uncertain and ambiguous in its terms, and it may be said to be doubtful whether it is a contract of sale, or only an agreement to supply Howe with stock to be manufactured by him for the plaintiffs. If this be so, then, as the stock originally belonged to the plaintiffs, the title to it is not shown to have passed out of them by the agreement.

But in the next place we are of opinion that this agreement is not a contract of sale. The plaintiffs use no words which necessarily or by implication indicate an intent to part with their title. And there is wanting in the agreement the distinguishing feature of a sale — a price for the goods, or a stipulation by which the price can be fixed.

The true interpretation of the contract seems to be that it was an agreement by which Howe agreed to manufacture the stock for the plaintiffs, and to receive from them, as his pay therefor, the proceeds of the sales of the goods, when manufactured and returned to them for sale, deducting the value of the stock and a commission of five per cent. on the sales. The only clause in the agreement which militates with this construction is that by which Howe agrees to "consign" the goods to the plaintiffs for sale. But in connection with the subject matter, we think this means only that he will send them back to them for sale, when manufactured.

The bills of parcels which were sent from time to time with the merchandise were susceptible of explanation by parol evidence, and did not change the terms of the written agreement under which the property was sent to Howe. They were sent

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only as memoranda of the amount and value of the merchandise transmitted. *Hazard* v. *Loring*, 10 Cush. 267.

Such being the true construction of the contract, it follows that the defendant had no valid title to the property as against the plaintiffs, and is not aggrieved by any rulings of the court upon the admission of evidence. *Exceptions overruled.*

Anthony Chase *vs.* Ethan Allen.

In an agreement consisting of several stipulations, the damages for a breach of which cannot be well ascertained and valued, a certain sum, stipulated to be paid for a breach of any stipulation, is to be regarded as liquidated damages.

The owners and occupants of real estate in a certain part of a city subscribed $11,000 to aid A in building a hotel there, and the agreement between A and the subscribers was deposited with C, for the benefit of all parties; and A, upon receiving payment of the amount of this subscription, agreed, in case he should fail to build the hotel within a certain time, and in a certain manner, to refund the money with interest, and pay "full damages to the subscribers for their trouble and disappointment;" and afterwards, upon receiving notes of some of the same persons and of others for an additional like subscription of $9,000, gave a bond to C, conditioned, in case of failure to fulfil his agreement, to pay to C on demand, for the benefit of the original subscribers, $11,000 with interest, to discharge the subscribers of the second agreement from all liability thereon, and to "further pay to C, for the benefit of all the subscribers, in proportion to the amount of their subscriptions, the additional sum of $20,000, not as a penalty, but as fixed and liquidated damages, and subject to no deduction." *Held*, that this sum of $20,000 was liquidated damages, and not a penalty; and that, upon A's breach of the agreement, C might maintain an action against him for a portion thereof equal to the subscriptions of all those who had waived any rights under the first agreement, and had not settled and released their claims upon A.

Action of contract upon a bond dated April 29th 1854, in the penal sum of fifty thousand dollars, with this condition:

"The condition of this obligation is such, that whereas the said Ethan Allen has already received the sum of eleven thousand dollars, to aid him in constructing a hotel, according to the terms of a contract signed by Ethan Allen, John F. Pond and others, bearing date the 27th day of April A. D. 1853, and now deposited with said Anthony Chase; and whereas William C. Clark and others have made an additional subscription, to the

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amount of nine thousand dollars, payable when the hotel referred to in said contract shall be completed, at any time on or before the twenty seventh day of October, A. D. 1856; and whereas the said Allen, in consideration of said original contract, and of said additional subscription, has agreed that he will complete said hotel, according to the terms of said contract, and also according to" certain plans and specifications, on or before that day, and will do certain portions of the work during the year 1854; "and has further agreed, that in case he shall fail to fulfil said agreement, he will pay to said Anthony Chase, on demand, for the benefit of the subscribers to said original contract, who have paid their subscriptions, the sum of eleven thousand dollars, with interest from the time when the same was paid to said Allen; to be paid by said Anthony Chase to said subscribers, in proportion to the several sums subscribed by them; and will also discharge the subscribers for the additional sum of nine thousand dollars from all liability and obligation to pay the same; and will further pay to said Chase, for the benefit of all the subscribers, in proportion to the amounts of their subscriptions, the additional sum of twenty thousand dollars, not as a penalty, but as fixed and liquidated damages, and subject to no deduction. Provided however, that in case said hotel shall be destroyed or partially injured by fire in the course of erection, before the twenty seventh day of October A. D. 1856, a reasonable time beyond that day shall be allowed to said Allen to complete said hotel, having regard to the extent of the injury sustained by fire; and provided further, that in case of the death of said Ethan Allen before the twenty seventh day of October A. D. 1856, the personal representatives of said Allen shall be liable for no more than said sum of eleven thousand dollars, and the interest which shall accrue thereon: Now if said Ethan Allen shall well and truly perform his agreement, as aforesaid, then this obligation shall be void; otherwise, shall remain in full force and virtue."

The case was submitted to the decision of this court, and argued in Worcester at October term 1858, upon a statement of facts, the material part of which was as follows:

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By the original contract for the subscription of $11,000, the defendant agreed with the subscribers that the hotel should be completed within two years and a half from the 27th of April 1853, and it was agreed that the contract should be deposited in the hands of the plaintiff, (who was one of the subscribers,) for the benefit of all parties. The defendant, upon receiving payment of this subscription, agreed that, if he should fail to erect the hotel according to the contract, he would refund all the money so paid, with interest, and would also pay "full damages to the subscribers for their trouble and disappointment;" provided that in case of his inability, by reason of death, to complete said building, his representatives should pay no damages, by reason of this original provision, beyond the sums so received by him, and interest.

The agreement for the subscription of $9,000 was made at the same time as the bond declared upon, and was signed by a portion only of the original subscribers and by many other persons.

The hotel was to have been built on the corner of Main and Pleasant Streets in the southerly part of the city of Worcester, where many of the subscribers owned real estate or transacted business. It has never been built.

The subscribers of the second agreement gave notes for the amount of their subscriptions, payable on the completion of the hotel; but no payment of those notes has ever been made or demanded.

On the 30th of March 1855 many of the subscribers of the agreements acknowledged in writing that they had received of the defendant a certain sum of money in full satisfaction of any sums to which they might be entitled by virtue of the provisions of the bond, and released all claims upon the defendant by virtue of the bond, and directed the plaintiff not to commence any proceedings against the defendant, under or by reason of the bond, to enure to their benefit.

On the 28th of October 1856 the plaintiff made upon the defendant the following demand in writing: "Worcester, October 28th 1856. Ethan Allen, Esq.: By your bond to me, executed

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April 29th 1854, you engaged to erect a hotel on your land, corner of Main and Pleasant Streets, and complete the same on or before October 27th 1856. That time having expired, and the building not having been erected, I hereby, in behalf of those for whom I hold said bond, demand of you payment of the sev eral sums agreed by you to be paid in default of your perform ance of your agreement to erect said hotel, being the sums received by you, with interest from the time of payment, and the further sum of twenty thousand dollars. Any releases you may have obtained from any of the subscribers may be produced by you, and the amounts so released will be deducted from the sums to be paid by you. Respectfully yours,

"Anthony Chase, as Trustee."

C. Allen & H. Chapin, for the plaintiff.

F. H. Dewey, for the defendant, cited Sedgwick on Damages (2d ed.) 396–426; 2 Greenl. Ev. § 257; *Shiell* v. *M'Nitt*, 9 Paige, 101; *Jackson* v. *Baker*, 2 Edw. Ch. 471; *Beale* v. *Hayes*, 5 Sandf. 640; *Haldeman* v. *Jennings*, 14 Ark. 329; *Thoroughgood* v. *Walker*, 2 Jones (N. C.) 15; *Merrill* v. *Merrill*, 15 Mass. 488; *Kellogg* v. *Curtis*, 9 Pick. 534; *Shute* v. *Taylor*, 5 Met. 64.

Bigelow, J.* The determination of the question, whether a sum named in a contract, to be paid for a breach, is to be regarded as a penalty, or as liquidated and ascertained damages, depends not so much on the form or language of the contract, as upon its subject matter, and the nature of the covenants or agreements, for a breach of which the damages are stipulated to be paid. *Hodges* v. *King*, 7 Met. 583. Mayne on Damages, 68. The rule of construction applicable to such stipulations is now well settled. Where a party agrees to pay a certain sum in case he fails to perform any one of divers acts which are of different degrees of importance, and which are capable of being estimated and measured in money, the sum named as damages is to be treated as a penalty; but if the contract consists of several stipulations, the damages for a breach of which cannot be well ascertained and valued, then the parties are deemed to have

* Merrick, J. did not sit in this case.

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intended that the sum agreed on shall be treated as liquidated damages, from which there is to be no deduction. *Green* v. *Price*, 13 M. & W. 701, 702, and 16 M. & W. 346. *Atkins* v. *Kinnier*, 4 Exch. 783. *Curtis* v. *Brewer*, 17 Pick. 513. *Heard* v. *Bowers*, 23 Pick. 455.

The case at bar clearly falls within the latter branch of this rule. The subject matter of the contract is such as to render it quite impossible to form any estimate of the damages occasioned by a breach of its stipulations. No standard by which the damages can be measured is furnished by the contract itself, nor would extrinsic evidence afford any means by which they could be accurately or even approximately ascertained. The persons who subscribed to the fund to aid the defendant in erecting a hotel were prompted to do so by the expected benefit which would thereby accrue to them respectively by enhancing the value of their real estate, and by increasing the business in that part of the city of Worcester. It is obvious that the damages which each would sustain by the loss of this anticipated benefit are peculiarly uncertain and difficult of estimation in money. This is therefore one of those cases where it must be presumed that the parties stipulated for the payment of a fixed sum of money absolutely, from the difficulty of ascertaining any exact amount of damage which would be sustained by a breach of the agreement.

We have no doubt that the bond declared on was intended as a substitute for the agreement by which the defendant, on receiving the amount of the first subscription, agreed to pay damages to each of the subscribers, in case of a failure to fulfil the contract on his part. The defendant cannot therefore be held liable to the same persons on both agreements. Those only can claim damages in this action who have not settled with the defendant and released their claims, and who shall elect to waive their claims to damages under the first contract.

Judgment for the plaintiff.

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WILLIAM RICE & others *vs.* FRANCIS H. DEWEY & others.

Property mortgaged to secure notes indorsed by the mortgagee for the accommodation of the mortgagor will be applied in equity, upon the insolvency of both maker and indorser, to the payment of such notes.

BILL IN EQUITY by certain holders of promissory notes signed by William R. Hooper and indorsed by Beriah Curtis, in behalf of themselves and other holders of like notes, against Francis H. Dewey, assignee in insolvency of Curtis, and Isaac Davis and John W. Wetherell, assignees in insolvency of Hooper. The bill contained the following allegations:

Curtis in and before 1856 indorsed for the accommodation of Hooper various promissory notes signed by Hooper, and Hooper gave Curtis mortgages of several tracts of land in the counties of Worcester and Franklin to secure the payment of all notes so signed and indorsed, "without loss or damage to said Curtis."

In December 1856 Hooper, still holding the equity of redemption in said lands, applied for the benefit of the insolvent laws, and his estate was duly assigned to Davis and Wetherell, who accepted the trust. On the 6th of February 1857 Davis and Wetherell made an agreement in writing with Curtis, by which he agreed to release to them all his interest in the land included in one of the mortgages; and they agreed to convey to him the lands included in the other mortgages, as payment of $12,000 of the sum for which Curtis might be liable on account of Hooper; and it was agreed that "whatever amount more than $12,000 said Curtis may be liable for may be proved against said Hooper's estate, either by said Curtis or by parties having a right to prove the same." And Curtis executed a release of one of the mortgages, pursuant to this agreement. All of the mortgaged premises were insufficient to pay in full the notes signed by Hooper and indorsed by Curtis; and Curtis was then insolvent.

On the 27th of April 1857 proceedings in insolvency were commenced against Curtis, and Dewey was appointed his assignee and accepted the trust.

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Davis and Wetherell, as assignees, sold parts of the mortgaged real estate to which they had agreed Curtis should be entitled, and received therefor about $3,000, which Dewey, as assignee of Curtis, had demanded of them for the benefit of the creditors of Curtis; but they refused to pay it to him, and now claimed that it had been applied by them, within six months before the commencement of insolvency proceedings against Curtis, towards the payment of certain notes signed by Hooper and indorsed by Curtis, and held by Davis and Wetherell and others as their own property, which payments were in the nature of a preference and void by the insolvent laws. Dewey disposed of parts of the real estate to which it had been agreed that Curtis should be entitled, and received therefor about $3,600. Davis and Wetherell claimed the proceeds of the sales made by Dewey, as part of the general assets of Hooper's estate.

The plaintiffs prayed for an account, and for a sale of so much of the real estate mortgaged by Hooper to Curtis as remained unsold, and for an application of the proceeds thereof and of the portions already sold as aforesaid towards the payment of the notes signed by Hooper and indorsed by Curtis, and remaining unpaid at the time of commencement of Hooper's proceedings in insolvency.

The defendants demurred to the bill for want of equity; and because, upon the facts stated in the bill, the defendants did not hold the mortgages, mortgaged estates or the proceeds thereof in trust for the plaintiffs, and the plaintiffs were not entitled to have the mortgages enforced or the proceeds applied towards the payment of their notes. This demurrer was argued at Worcester at October term 1858.

P. C. Bacon & F. H. Dewey, for the defendants, cited *Agawam Bank* v. *Morris*, 4 Cush. 103; *Young* v. *Miller*, 6 Gray, 156.

W. F. Slocum, for the plaintiffs, cited *Eastman* v. *Foster*, 8 Met. 19; *Crane* v. *March*, 4 Pick. 131; *Moore* v. *Ware*, 38 Maine, 496; *Phillips* v. *Thompson*, 2 Johns. Ch. R. 418; *Evertson* v. *Booth*, 19 Johns. 486; *Kip* v. *Bank of New York*, 10 Johns. 63; *Pattison* v. *Hull*, 9 Cow. 747; *Heath* v. *Hand*, 1 Paige, 329; *Keyes* v. *Brush*, 2 Paige, 311; *Homer* v. *Savings Bank of*

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New Haven, 7 Conn. 478; *Keyes* v. *Wood*, 21 Verm. 331; *Belding* v. *Manly*, 21 Verm. 550; *Donley* v. *Hays*, 17 S. & R. 400; *Page* v. *Pierce*, 6 Foster, 317; 4 Kent Com. (6th ed.) 193, 194; 1 Story on Eq. §§ 502, 638; 2 Story on Eq. §§ 1016, 1031; *Mitford* v. *Mitford*, 9 Ves. 87.

Bigelow, J. This case falls within the principle established in *Eastman* v. *Foster*, 8 Met. 19. It was there decided, that a mortgage made by a principal to a surety, to secure the payment of certain notes, and indemnify the surety therefrom, was not to be regarded simply as an indemnity of the surety; but constituted the surety and mortgagee a trustee for the creditors whose debts were enumerated in the condition, and created an equitable lien in their favor for the security of the notes recited or described in the condition; and that this equitable lien, being attached to the property in the hands of the mortgagee, would remain and bind the property in the hands of an assignee of the mortgagee with notice of the trust, and would also follow it into the hands of the original mortgagor or his grantee taking it with like notice of the trust. This decision rests on the broad principle of equity, that the estate of the mortgagee is to be treated as a mere security for the debt, and when the debt is assigned by the mortgagee, it carries with it in equity, as an incident, a right to have the estate appropriated for the payment of the debt in the hands of the assignee. To carry out and enforce this equity, the mortgagee is regarded as the trustee of those to whom he has assigned the debt secured by the mortgage, and can be compelled to appropriate it for their benefit. 2 Story on Eq. § 1016. *Crane* v. *March*, 4 Pick. 131, 136. *Bryant* v. *Damon*, 6 Gray, 564.

In the present case, it appears by the averments in the bill that the notes held by the plaintiffs and by those in whose behalf they prosecute this suit were signed by Hooper, and indorsed by Curtis for the accommodation of Hooper; that the mortgages described in the bill were given by Hooper to Curtis to secure the payment of these notes and indemnify him against any liability thereon; and that the defendants, as assignees of Hooper and Curtis, the mortgagor and mortgagee, have received

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said mortgages or the proceeds thereof with full notice of the purposes for which the mortgages were given. In regard to all these notes, Curtis, being an accommodation indorser, stood in the relation of surety for Hooper to the several persons to whom the notes were negotiated. The mortgages set out in the bill were given to Curtis to secure the payment of these notes. The property was thereby pledged as security for the debts. A trust was fastened upon it in the hands of the mortgagee for the benefit of those who should become creditors by purchasing notes secured thereby; and this trust, in the nature of an equitable lien, can be enforced against these defendants, who took that property from the mortgagor and mortgagee with notice thereof.

The case of *Agawam Bank* v. *Morris*, 4 Cush. 99, does not at all resemble the case at bar. It was not a case where a creditor sought to have a mortgage given to a surety or indorser applied in payment of a debt. The question there arose on expunging a proof of debt, and was decided on the ground that the mortgage was given not to secure the entire debt, but only such balance thereof as should remain after proof of the debt had been made and a dividend received from the estate of the insolvent.

The case of *Young* v. *Miller*, 6 Gray, 152, only decided that an indorsee of one of two notes secured by a mortgage which is not assigned to him cannot maintain a writ of entry in his own name to foreclose the mortgage.

Demurrer overruled.

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JONATHAN D. WHEELER *vs.* LYMAN D. ALDRICH & Trustee.

One who has been adjudged trustee in foreign attachment, and paid over, on the execution issued on such judgment, all the funds in his hands, cannot be charged for such funds in a subsequent suit, if the officer's return states that the principal defendant had no place of abode within this state, and the record shows such order of notice as would be proper if that were the fact.

TRUSTEE PROCESS, returnable to the court of common pleas in Worcester. Winthrop Faulkner, summoned as trustee of the principal defendant, who was described as of Natchez, in the State of Mississippi, disclosed that he had previously been summoned as trustee in two other writs against this defendant, in the first of which the amount claimed much exceeded the sum in his hands.

The plaintiff then alleged in writing that the defendant, at the time of the service of those writs, had a last and usual place abode in this commonwealth; that "said writs were not served by leaving a copy thereof at such last and usual place of abode in this commonwealth; that there is no statement in the returns of the officers on said several writs that said Aldrich had no tenant in their precinct, and there was no legal service of said writs on said Aldrich; wherefore the plaintiff says that said writs were not duly served, and that the proceedings thereon are erroneous, and that the trustee ought to be charged in this action."

To these allegations the trustee demurred for various reasons, which he assigned specially; and also, by leave of court, filed an additional answer, in which he stated that since the filing of his first answer judgment had been rendered and execution issued thereon in the first process, for a sum exceeding the amount of the defendant's funds in his hands, and he had paid thereon all those funds, deducting his own costs.

Morris, J. discharged the trustee, and the plaintiff appealed to this court, before whom the case was argued at Worcester at October term 1858.

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W. F. Slocum, for the plaintiff.

S. H. Allen, for the trustee.

DEWEY, J. The question raised here is as to the validity of the service of two former writs against Aldrich as principal, and Faulkner as trustee, on one of which judgment was rendered, and the money paid in discharge thereof by the trustee. Unless this prior attachment by the trustee process can be treated as voidable by a subsequent attaching creditor, the trustee must be discharged as having no credits or effects of Aldrich in his hands.

Under our decisions in *Downs* v. *Fuller*, 2 Met. 135, and *Leonard* v. *Bryant*, 11 Met. 370, a judgment may be impeached by such subsequent creditor, without, in the first instance, suing out a writ of error to vacate such judgment. This is so held, because the subsequent attaching creditor is not a party or privy to the judgment in any such sense as to entitle him to sue out a writ of error to reverse it.

It is to be borne in mind that the precise question here is, whether the trustee is to be again charged for the funds in his hands, after having paid over the same upon a judgment against his principal, in an action in which he was summoned as trustee. Was there enough on the face of the proceedings to justify such payment; or was he bound to go beyond the return of the officer, and inquire as to the existence of other facts? We think he was not bound so to inquire, and if upon the face of the return of the officer a due service appears to have been made upon the principal, and there is no other objection to the validity of the proceedings than that of want of service upon the principal, it is a sufficient justification for the trustee, and he may safely pay over the money in his hands. *Morrison* v. *New Bedford Institution for Savings*, 7 Gray, 269, is directly to this point.

Without expressing any opinion as to the effect that would result from proof of the facts, alleged by the plaintiff in the present suit to have existed, that Aldrich had a last and usual place of abode in this commonwealth at the time of the service of the writ, if a writ of error were brought by the principal defendant against the plaintiff in that suit; it is enough to say

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that the return made by the officer was sufficient to protect the trustee, provided the subsequent proceedings were conformable to the provisions of the Rev. Sts. *c.* 92, § 3, for cases where the defendant was not an inhabitant of or resident within the State at the time of the service, and a continuance of the action was had, and due notice ordered and given. Assuming those to have been in conformity with the statute, the trustee may rely upon such former judgment as a justification for paying over on such judgment the money of the principal in his hands.

Trustee discharged

SAMUEL P. P. FAY, Judge of Probate, *vs.* ELIZABETH MUZZEY & others.

Manure taken from the barnyard of a homestead, and piled upon the land, though not broken up nor rotten, nor in a fit state for incorporation with the soil, is part of the realty, and does not go to the administrator of the owner.

An administrator must be charged with the value of manure which is personal property although he has spread it in the usual course of good husbandry upon the land of the deceased, and has sold the land for the payment of debts.

An administrator must account for chattels included in his inventory to an administrator *de bonis non*, although they are also included in the inventory of the latter.

ACTION OF CONTRACT upon the probate bond of Elizabeth Muzzey as administrator of the estate of her husband, Benjamin Muzzey, brought for the use of Moses G. Cobb, administrator *de bonis non* of said Benjamin. Trial in this court in Middlesex at October term 1852, before *Cushing*, J., who reported the following case for the judgment of the full court:

"The case, after default of the defendants, was referred to an auditor, who reported that he found due to the plaintiff from the defendants the sum of $4,872.68; and also the further sum of $47.58 for manure, unless upon the following facts the court should determine otherwise as matter of law: It was proved that a large pile of manure, containing some eight or ten cords, not broken up nor rotten, and not in a fit condition for incor-

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poration with the soil, stood on the land of the said Benjamin at the time of his decease, and so continued until after the appraisal returned by said Elizabeth into the probate court; and this manure was taken from the barnyard of the homestead of said deceased.

"Also the further sum of $31.72, unless upon the following facts the court should determine otherwise as matter of law: It was proved that certain other manure, duly set down in said Elizabeth's inventory, and without controversy the personal property of said Benjamin at the time of his decease, was, after the date of her said appraisal, by her authority spread upon the lands which descended from her intestate; that this was done judiciously, in an agricultural view, and in the usual course of good husbandry. This manure was taken from the hotel stable standing on the land of said deceased. All the real estate of the deceased was afterwards sold for the payment of debts.

"Also the further sum of $440.49, unless upon the following facts the court should determine otherwise as matter of law: Certain chattels, duly set down in said Elizabeth's inventory, are also set down in the inventory returned by said Cobb as administrator *de bonis non;* and in her second account the said Elizabeth alleges that fact in discharge of her liability for the value of said chattels. Said Cobb never received the property as appraised."

This case was argued in writing.

M. G. Cobb, for the plaintiff. 1. Manure in a heap, before it is spread upon the land, is personal property, and goes to the executor or administrator. 1 Williams on Executors (11th Amer. ed.) 615. The fact that the first parcel had been taken from the barnyard of the deceased's homestead cannot affect this question; although, if it had been in the barnyard at the time of the intestate's death, it might be otherwise. *Kittredge* v. *Woods*, 3 N. H. 503.

2. The other parcel of manure is admitted to have been personal property at the time of his decease; and there is no law authorizing the administratrix to spread it upon the land, and thus escape accounting for it.

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3. The administratrix must account for the chattels set down in her inventory, and never received by the administrator *de bonis non*. The entry of them in his inventory is *prima facie* evidence, but not conclusive against him. *Stearn* v. *Mills*, 4 B. & Ad. 657. *Craig* v. *McGehee*, 16 Alab. 41. *Boggan* v. *Walter*, 12 Sm. & Marsh. 666. Rev. Sts. *c.* 67, § 5.

J. P. Converse, for the defendants. 1. The administratrix should not be charged with the manure taken from the barnyard of the homestead of the deceased, inasmuch as that was real estate and belonged to the homestead. *Daniels* v. *Pond*, 21 Pick. 367. *Lassell* v. *Reed*, 6 Greenl. 222. *Kittredge* v. *Woods*, 3 N. H. 503.

2. The other manure having been expended upon the real estate in the usual course of good husbandry, and the real estate having been sold for the payment of the intestate's debts, his creditors have once had the benefit of the manure, and cannot recover its full value again.

3. Upon the appointment of the administrator *de bonis non*, all the chattels of the intestate vested in him, and the former administratrix cannot be charged with them, unless she had disposed of them or converted them to her own use, or improperly withheld them from her successor — neither of which appears.

Hoar, J. 1. The court are of opinion that manure from the barnyard of the homestead of the intestate, standing in a pile upon his land, although "not broken up nor rotten, and not in a fit condition for incorporation with the soil," is not therefore assets in the hands of his administratrix, and that she is not chargeable therewith as a part of his personal estate. Manure, made in the course of husbandry upon a farm, is so attached to and connected with the realty, that, in the absence of any express stipulation to the contrary, it passes as appurtenant to it. This has been so decided as between landlord and tenant, in the cases of *Daniels* v. *Pond*, 21 Pick. 367; *Lassell* v. *Reed*, 6 Greenl. 222; and *Middlebrook* v. *Corwin*, 15 Wend. 169. The reason of the rule is, that it is for the benefit of agriculture, that manure, which is usually produced from the droppings of cattle or swine fed upon the products of the farm, and composted with earth or

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vegetable matter taken from the soil, and the frequent application of which to the ground is so essential to its successful cultivation, should be retained for use upon the land. Such is unquestionably the general usage and understanding, and a different rule would give rise to many difficult and embarrassing questions.

The same doctrine was applied, as between vendor and vendee, in *Kittredge* v. *Woods*, 3 N. H. 503, and in *Goodrich* v. *Jones*, 2 Hill (N. Y.) 142. The doctrine as to fixtures and incidents to the realty is always most strictly held, as between heir and executor, in favor of the heir, and against the right to disannex from the inheritance whatever has been affixed thereto. *Elwes* v. *Maw*, 3 East, 51.

The circumstance that a thing is not permanently affixed to the freehold, but is capable of detachment, and is even temporarily detached from it, is not conclusive against the right of the owner of the land. Thus keys of doors go to the heir, and not to the executor; Wentworth on Executors, 62; and in *Goodrich* v. *Jones*, *ubi supra*, it was held, that fencing materials, which have been used as a part of the fence, accidentally or temporarily detached from it, without any intent of the owner to divest them permanently from that use, do not cease to be a part of the freehold. In *Bishop* v. *Bishop*, 1 Kernan, 123, the same principle was applied to the case of hop poles, which had been taken up and laid in heaps for preservation through the winter; and it was held, that they would pass by a conveyance of the land.

2. The manure from the hotel stable, which is agreed to have been personal estate, and was included in the inventory, must be accounted for by the administratrix; and it is no sufficient account to say that she has expended it upon the real estate which has since been sold for the payment of debts. There is no way in which it can be made certain that it has increased the amount received from the sale of the real estate; and if this were established, an administrator has no right thus to expend the personal property of her intestate.

3. The chattels which were returned by the administratrix in her inventory must be accounted for by her. If it should ap-

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pear that they had been delivered by her to her successor, the administrator *de bonis non*, that would discharge her from her liability. The fact that the chattels were in existence, and had not been sold by the administratrix, would make it proper for him to include them in his inventory. They belong to the estate, and remain to be administered, and the administrator *de bonis non* is entitled to receive them, or to maintain a suit for their value against the administratrix. Having made a demand for them, and not having actually received them into possession, it would have perhaps been more correct to insert in his inventory the claim for their value, rather than the chattels themselves. Perhaps, when he returned the inventory, he expected to receive them. The fact that he included them in his inventory in this form might be evidence that they had actually been delivered, if that question were in controversy. But the fact being otherwise, there is no estoppel against showing it; and the chattels being a part of the estate which the administratrix has received, and not applied in any manner according to her official duty, she is to be charged with their value in this action.

The last two items in the auditor's report are therefore to be added to the first sum found by him to be due from the defendants to the plaintiff, and judgment being rendered for the penalty of the bond, execution is to issue for those amounts, with interest from the date of the auditor's report.

Moses G. Cobb, Administrator, *vs.* Elizabeth Muzzey, Administratrix.

An administrator of an insolvent estate must account to an administrator *de bonis non* for sums of money paid on debts of the intestate by the first administrator during the first year of his administration, though without knowledge that the estate was insolvent.

An administrator is responsible for personal property applied by him to repairs and improvements of the real estate, though so applied in executing an agreement of the intestate.

Appeal by the administrator *de bonis non* of Benjamin Muzzey from a decree of the judge of probate, allowing the second

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account of Elizabeth Muzzey, widow and first administratrix of said Benjamin. The reasons of appeal relied upon were these:

1st. That the administratrix was allowed sums of money, paid by her in payment of the intestate's debts, within a year after the granting of letters of administration to her, and before the estate was known to be insolvent.

2d. That she was allowed money advanced and expenses incurred by her in finishing the Lexington House, which was a public house built by the intestate, and left at his death in an unfinished state, and which, before his death, he had leased by oral lease for a term of years, and the lessee had entered upon and occupied, and the unfinished parts of which the intestate had agreed to finish to the satisfaction of the lessee, and also to build a stable, for all which the lessee was to pay an annual rent of $1,200. The administratrix, in order to carry out the intentions and agreements of the intestate, and from fear that the lessee might claim damages, expended the sums in question in finishing the house and building the stable. This property was ultimately sold by the administrator *de bonis non;* but, during a year which intervened between the intestate's death and such sale, the administratrix, who continued to keep house and to support the family of the intestate, received the rent as stipulated, and received other rents and income from the property of the intestate to the amount of $1000.

Cushing, J., before whom a hearing was had in Middlesex at October term 1852, reported the foregoing case for the decision of the full court, before whom it was argued in writing.

M. G. Cobb, pro se.

J. P. Converse, for the appellee.

Hoar, J. The court are of opinion that the appeal of the administrator *de bonis non* must be sustained, for both the reasons stated, and that the allowance of both classes of payments to the administratrix in her account was erroneous.

1. An administrator of an estate that is insolvent is answerable for the whole estate in his hands, to be applied in a general distribution among the creditors. If he pays one in preference

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to others, it is a payment in his own wrong, and such payment cannot discharge him from a liability to account for the money which he has thus expended in violation of his official duty. The only exceptions to the rule are the cases of privileged debts, which the debts paid by the administratrix in this case are not shown to have been; and of payments made after a year from the date of the administration, without notice of other debts to an amount which would render the estate insolvent.

2. The administratrix had no right to apply the personal estate to repairs and improvements of the real estate. The only ground relied on in the argument of the appellee, to support her claim to allowance of the sums thus expended, namely, that the creditors have virtually received the benefit of them by an increased price in the sale of the real estate, does not seem to be established; and indeed we can hardly see how it is capable of proof. There is the less hardship in holding the administratrix responsible, that she and the heirs have received from the real estate a larger sum than has been expended upon it. *Decree of judge of probate reversed, and case remitted.*

Roxana Hixon *vs.* City of Lowell.

A city is not liable for an injury, caused to a foot passenger on a sidewalk which the city is bound to keep in repair, by the falling of an overhanging mass of snow and ice from the roof of a building not owned by the city, although it has so overhung the highway for more than twenty four hours before the accident.

Action of tort to recover damages for personal injuries caused by an alleged defect in a highway in Lowell, called Market Street, and by the falling of snow and ice from the roof and gutter of the Second Universalist Church, situated on said street.

At the trial in the court of common pleas in Middlesex at September term 1858, it was admitted that the street and side-

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walk were unobstructed, and in a perfect state of repair upon the surface, and that the sidewalk was ten feet wide. There was evidence that this street was one of the principal streets of the city; that the church was built by its proprietors close upon the line of the street, and between forty and forty five feet high above the sidewalk; that during the heavy snow storms of the winter of 1855–56 the snow accumulated upon the roof of the church in large quantities, and, as it thawed, gradually slipped down, and hung projecting over the sidewalk from eighteen inches to two feet; that the plaintiff, while passing along the street, was struck by snow falling from the building; that the snow fell upon the sidewalk from the centre of the walk to the street, and lay flattened out like any snow slide; and that the snow had been seen overhanging the eaves and gutter of the church more than twenty four hours before the accident.

Perkins, J. instructed the jury "that if they were satisfied that a mass of snow and ice, forming a projection from the building named, hung suspended eighteen inches or two feet over the public travelled sidewalk, in such a position as to be dangerous to the public travel along the same, and to render the way unsafe for the citizens and others passing and having a right to pass and repass along and over it, and said projection of snow and ice had existed and been hanging extended over said sidewalk for more than twenty four hours previously to the accident and injury to the plaintiff complained of, or after some of the principal inhabitants and taxpayers of the city had been notified thereof, and the same snow and ice, thus projecting and extended over the sidewalk, fell upon and injured the plaintiff, from natural causes then operating upon the same, as she was walking along the sidewalk in the usual course and line of public travel, and in the exercise of due care on her part, and the city had done nothing to warn her of the danger, or to protect her from the same, they would be liable for the injury done her by the fall of said snow and ice upon her; that the jury must be satisfied that the plaintiff was injured by that mass of snow and ice projecting from the eaves of the building, and overhanging the travelled part of the sidewalk, and must be

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satisfied that the mass of snow and ice fell at the time from the effect of natural causes then in operation upon it; that the law does not require towns and cities to insure against accidents; but if a mass of snow and ice overhangs the public travelled sidewalk, so as to extend eighteen inches or two feet into and over the sidewalk, and in that position is unsafe and dangerous to the public travel, it would be the duty of the public authorities to remove it, or otherwise protect the citizens against it, though it might be suspended forty or sixty feet high over the sidewalk; and that the proper officer would have the right to remove such a mass of snow and ice overhanging the street, and dangerous to the public travel, though one edge of it was attached to the eaves of a private dwelling-house located on the street."

The jury returned a verdict for the plaintiff, and in answer to an inquiry of the court stated that they found that the said mass of snow and ice had been in the position, in which it was at the time of the accident, for more than twenty four hours before that time. The defendant alleged exceptions, which were argued in Boston in February 1859.

T. H. Sweetser, for the defendant.

B. F. Butler, for the plaintiff.

Hoar, J. This case presents an extremely interesting question, affecting the duties and liabilities of towns and cities in regard to the repair and maintenance of highways. The action, so far as we are aware, is of novel impression in this commonwealth. By the Rev. Sts. *c.* 25, § 1, "all highways, town ways, causeways and bridges within the bounds of any town" are required to "be kept in repair at the expense of such town, so that the same may be safe and convenient for travellers, with their horses, teams and carriages, at all seasons of the year." By § 22 it is provided that "if any person shall receive any injury in his person or property, by reason of any defect or want of repair, which has existed for the space of twenty four hours, in any highway, town way, causeway or bridge," he may recover compensation therefor in the manner therein provided. And the same provision, with the exception of the limitation of twenty

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four hours, is reënacted in the *St.* of 1850, *c.* 5. We are now required to determine whether the facts reported disclose such a "defect or want of repair" in a highway as will create the liability of the town, contemplated by the statute.

The instructions of the justice who presided at the trial in the court of common pleas were full, explicit and carefully guarded, and not open to any valid exception, if the case presented would authorize a verdict for the plaintiff. That learned judge was undoubtedly guided in his ruling by the decision of this court in the case of *Drake* v. *Lowell*, 13 Met. 292. In that case it was decided, that where an awning was erected by the owner of a building adjoining a highway, projecting over the sidewalk, and supported by posts standing between the sidewalk and the part of the street intended for carriages, and such awning was allowed by the city to remain in an unsafe condition, so as to endanger travellers passing in the highway beneath it and exercising ordinary care, the city was responsible for an injury occasioned by the fall of the awning, when loaded with snow and ice after a storm, although the way was in all other respects safe and convenient for the public travel.

In this action, the plaintiff seeks to extend the operation of the principles of that decision to a case where the only defect in the highway was the projection, from the roof of a building, of a mass of snow and ice, which had gradually collected upon it, and had slid and been pressed forward by the snow above it, until it overhung the travelled way and rendered passing beneath it dangerous.

It may not be easy to perceive and state distinctly the difference between the two cases, in regard to the liability of the town; but we are all of opinion that there is such a distinction, and that the facts which were proved on the trial will not sustain this action.

In most cases, the town has discharged its duty, when it has made the surface of the ground over which the traveller passes sufficiently smooth, level and guarded by railings to enable him to travel with safety and convenience by the exercise of ordinary

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care on his own part. There may be many causes of injury, to which he might be exposed in travelling upon such a way, which would not constitute any defect or want of repair in the way itself. In *Vinal* v. *Dorchester*, 7 Gray, 421, it was held, that a town was not responsible for an injury caused to the plaintiff by the running of the cars of a railroad company across a public highway, although the railroad was constructed in a manner not allowed by law, and the trains run thereon in a manner dangerous to the travellers on the highway. The town, if it has done its duty in making the way safe and convenient in all the proper attributes of a way, is not obliged to insure the safety of those who use it.

The traveller may be subjected to inconvenience and hazard from various sources, none of which would constitute a "defect or want of repair" in the way, for which the town would be responsible. He might be annoyed by the action of the elements; by a hail storm, by a drenching rain, by piercing sleet, by a cutting and icy wind, against which, however long continued, a town would be under no obligation to furnish him protection. He might be obstructed by a concourse of people, by a crowd of carriages; his horses might be frightened by the discharge of guns, the explosion of fireworks, by military music, by the presence of wild animals; his health might be endangered by pestilential vapors, or by the contagion of disease; and these sources of discomfort and danger might be found within the limits of the highway, and continue for more than twenty four hours, and yet that highway not be, in any legal sense, defective or out of repair. It is obvious that there may be nuisances upon travelled ways, for which there is no remedy against the town which is bound by law to construct and maintain the way. If the owner of a distillery, for example, or of a manufactory adjoining the street of a city, should discharge continuously from a pipe or orifice opening toward the street a quantity of steam or hot water, to the nuisance and injury of passers by, they must certainly seek redress in some other mode than by an action for a defective way. If the walls of a house adjoining a street in a city were erected in so insecure a manner as to be liable to fall upon

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persons passing by, or if the eaves trough or water conductor was so arranged as to throw a stream from the roof upon the sidewalk, there being in either case no structure erected within or above the travelled way, it would not constitute a defect in the way.

It is true that the present case finds that the snow had slid from the eaves, so that for more than twenty four hours before it fell it hung above the sidewalk; but we can see no good reason why the plaintiff should therefore have a claim against the city, any more than if it had fallen directly from the roof without the intermediate suspension.

The liability of towns for injuries caused by defective ways is created by statute; and is not to be extended by construction beyond the limits which a reasonable interpretation of the statute establishes. We are of opinion that in *Drake* v. *Lowell* one of those limits was reached; and that where there is no structure, such as, if inconsistent with the safety of travellers, would be an encroachment upon the street, and the way itself is properly constructed, the descent of snow or water from the roof of a building, whether sudden or gradual, does not give a right of action against the town to recover compensation for the injury which it may occasion. It is not, within the meaning of the law, a "defect or want of repair in the highway."

New trial in this court.

JESSE COLBURN *vs.* WILLARD P. PHILLIPS & others.

An agent may sue on a written agreement made by him in his own name in behalf of his principal.

It is no ground of demurrer to a declaration on a written agreement, which sets forth the agreement and a breach thereof, that for some of the items of damage claimed the plaintiff is not entitled to recover.

An action for breach of an agreement to ship merchandise at a certain freight, by shipping it at a higher freight, may be maintained without a previous demand upon the defend ant for an allowance of the excess of freight, or a demand for the merchandise.

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ACTION OF CONTRACT upon the following agreement: "Salem, Oct. 6, 1853. Agreed with Jesse Colburn of Tyngsborough to ship say two hundred tons of rough stone, weighing from one to two tons each, from Phillips's Wharf, to the port of Norfolk, Va., at the rate of $1.75 per ton of fourteen cubic feet, and as soon after they are received as a vessel can be procured, the measurement to be made up from the marks upon each stone. Phillips, Goodhue & Bowker.

"It is understood that Mr. Colburn shall not be liable for any expenses at Salem, except the charge of freight above specified. "P., G. & B.

"To be delivered at Norfolk, Va., to the order of Gault & Brother. P., G. & B."

The substance of the declaration and of the demurrer thereto, upon which the case was argued in writing, are stated in the opinion.

S. H. Phillips & J. A. Gillis, for the defendants.

D. S. Richardson & W. A. Richardson, for the plaintiff.

HOAR, J. The plaintiff made a written contract with the defendants to ship two hundred tons of stone from Phillips's Wharf in Salem to Norfolk, Va., at the rate of $1.75 a ton, as soon after they were received as a vessel could be procured, to be delivered in Norfolk, to the order of Gault & Brother; the plaintiff not to be liable for any expenses at Salem, except the freight as above specified. The plaintiff in his declaration alleges in substance that he made the contract on behalf and for the benefit of the firm of Gault & Brother, and their assigns, Gault & Christy; that he delivered the stone at Phillips's Wharf; but that the defendants did not ship it at the price agreed, but at a higher price; and that Gault & Christy paid the higher rate, under protest, on a part of the stone, and on the rest were compelled to pay it by process of the court of admiralty, with divers costs, expenses and counsel fees.

The defendants file an answer, denying some of the material allegations of the declaration; and insert in their answer a demurrer, which now comes before us for adjudication.

Four causes of demurrer are assigned. 1. That by the plain-

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tiff's own showing the only cause of action belongs to Gault & Christy, and not to the plaintiff. In support of this it has been argued on the part of the defendants, that a promise made expressly to one who is only the agent of another, from whom the consideration wholly moves, will not support an action in the name of the agent. Undoubtedly some support to this doctrine can be found in the *dicta* of judges in several reported cases, and there seems to be some confusion and inconsistency upon the subject in the cases themselves. But upon a careful examination it may appear, that while the reasons given for some of the decisions cannot be well reconciled, the decisions are for the most part harmonious, and can be sustained upon sound principles.

In *Gilmore* v. *Pope*, 5 Mass. 491, which was an action upon a subscription for shares in a turnpike company, with a promise to pay the assessments to the plaintiff, who was an agent of the company, the plaintiff was nonsuited, and Parsons, C. J. said: "The action cannot be maintained in the name of a mere agent of the corporation, as in this transaction the plaintiff has alleged himself to be; there being no consideration, as between the agent and subscribers, to support an action of assumpsit." This remark of the chief justice would seem to assume that, to support a promise, the consideration must always move from the party to whom the promise is made. On examining the case, the promise is found to be a part of a contract to take and pay for shares in the turnpike road, in consideration of being admitted as associates in the corporation. This is very clearly a contract with the corporation. The promise is to pay the assessments to Gilmore or order; but there is not in terms any promise to Gilmore himself. The apparent purport, then, as well as the legal effect of the instrument, was an agreement with the corporation from whom the consideration proceeded. It would therefore stand as a promise to A., upon a consideration received from A., to pay a sum of money to B.; upon which it is now well settled in this commonwealth that B. can maintain no action, except under certain peculiar and limited conditions. *Mellen* v. *Whipple*, 1 Gray, 317. *Field* v. *Crawford*, 6 Gray, 116 *Dow* v. *Clark*, 7 Gray, 198.

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In *Buffum* v. *Chadwick*, 8 Mass. 103, the court decided, that where a note was made to the plaintiff, describing him as agent of the Providence Hat Manufacturing Company, the action could be maintained by him, although the objection was suggested that he was a mere agent, and that the consideration moved from the company alone. They distinguish the case of *Gilmore* v. *Pope*, which was cited by the defendants' counsel, and observe that in that case "the contract was directly with the corporation."

In the case of *Commercial Bank* v. *French*, 21 Pick. 486, it was decided, that a promissory note made to "the cashier of the Commercial Bank," the note being the property of the bank, was a contract with the bank, on which the corporation might sue. *Gilmore* v. *Pope* is cited as sustaining the decision; but the case rests upon the doctrine that, by a just construction of the language used, as terms of description, the contract was made with the bank.

In *Eastern Railroad* v. *Benedict*, 5 Gray, 561, it was determined that upon an order payable "to D. A. Neale, president of the Eastern Railroad Company," the corporation, being the real party in interest, might sue in its own name. The authorities were fully examined and discussed, and we are satisfied with the correctness of the decision; but no question arose in that case whether the action might not have been maintained, if brought in the name of the payee.

In *Gunn* v. *Cantine*, 10 Johns. 387, the action was upon a receipt given to an attorney, upon an undertaking to collect the money due upon a contract belonging to his principal; but the court notice the fact that there was no express promise to pay the money collected to the attorney; and only decide that the promise implied by law from the instrument was to the principal; a view consistent with that which we have suggested in regard to the case of *Gilmore* v. *Pope*.

There is a class of cases in which it has been held that a promise to a public officer, in his official capacity, must be enforced by a suit in the name of the public body for which he acts. *Pigott* v. *Thompson*, 3 Bos. & Pul. 147. *Irish* v *Webster*,

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5 Greenl. 171. *Garland* v. *Reynolds*, 20 Maine, 45. The principle is analogous to that which holds that one who signs a contract as a public officer is not personally responsible upon it; though the ground upon which it is put is, that a just construction of the contract makes it the contract of the principal.

In *Thatcher* v. *Winslow*, 5 Mason, 58, Mr. Justice Story held, that an agent, not having any legal or equitable interest in a promissory note, cannot sue as indorsee upon it. The only authorities which he names in support of the doctrine, are *Gunn* v. *Cantine* and *Gilmore* v. *Pope*, before cited. If the effect of the decision is merely this, that putting a promissory note into the hands of an agent, indorsed in blank, without any authority express or implied to him to bring a suit upon it, will not constitute such a transfer of the note to him as will support an action upon it in his name, we have no doubt of its correctness. *Sherwood* v. *Roys*, 14 Pick. 172.

But in Story on Agency, § 394, it is said that "if a negotiable note is indorsed in blank, and sent by the owner to his agent for collection, the agent may sue thereon in his own name as indorsee;" and in § 161, that "if an agent should procure a policy of insurance in his own name, for the benefit of his principal, the agent, as well as the principal, may sue thereon." In §§ 392, 393, 395, 396, the doctrine is stated in the broadest terms, that whenever the contract is made in writing expressly with the agent, and imports to be a contract personally with him, and also where he is the only known or ostensible principal, and therefore is, in contemplation of law, the real contracting party, he may sue in his own name. And such is the general current of the authorities; and we are satisfied that, to support an action upon an express promise, it is in general immaterial whether the consideration move from the promisee or from another.

In *Baxter* v. *Read*, cited in Dyer, 272 *b*, *note*, it was "adjudged, that where Baxter had retained Read to be miller to his aunt, at ten shillings per week, this will support an action on the case; for although it is not beneficial to Baxter, it is chargeable to Read."

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In *Goodwin* v. *Willoughby*, Pop. 178, Doderidge, J. says: "If a stranger saith, 'Forbear such a debt of J. S. and I will pay it,' it is a good consideration for the loss to the plaintiff."

In *Sargent* v. *Morris*, 3 B. & Ald. 277, it was held, that the consignee could not sue for damage to goods shipped on board the defendant's vessel, the consignee being only the agent of the consignors, and having no present interest in the goods at the time of the injury. But there the bill of lading stated the receipt of the goods from the consignors, and undertook "to deliver the same to you, and in your name, according to custom and usage, to Mr. Sargent or his assigns, paying freight," &c.

In *Sims* v. *Bond*, 5 B. & Ad. 393, and 2 Nev. & Man. 616, Lord Denman asserts, that "it is a well established rule of law, that where a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it."

In the case at bar, the contract was with the plaintiff in his own name, no other principal was disclosed, and it was executed on his part. We think the promise of the defendants was upon a sufficient consideration, and may be enforced by the person to whom it was expressly made.

2. It is said the declaration does not charge the defendants with the direct consequence of their breach of agreement, but for an excess of freight paid by the plaintiff. The contract and the breach of contract are expressly set forth. The damages occasioned thereby may or may not be correctly claimed or estimated, and it is no cause of demurrer.

3. It is objected that the declaration charges the defendant with the costs and expenses of the suit in admiralty. But this is only a statement, in part, of the damages; and although mistaken, does not affect the right to maintain the action.

4. The declaration does not state any demand upon the defendants for an allowance for the excess of freight, or a demand on them for the stone. No such statement is necessary. The gist of the action is the omission to furnish a vessel to carry the stone at the agreed price. When the defendants had shipped the stone at a higher rate, they had broken the contract declared on. *Demurrer overruled, and case remitted*

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Abel H. Fuller *vs.* Luther Shattuck.

A debtor who has paid money on account of his debt cannot, upon the creditor's subsequently recovering judgment against him for the whole amount of the debt, maintain an action against the creditor to recover back the money so paid.

Hoar, J. Upon a declaration for money had and received by the defendant to the plaintiff's use, the plaintiff seeks to recover the sum of fifty dollars, which is set forth in his bill of particulars thus: "December 10th 1849. To cash paid for sleepers, $50.00."

To support this declaration he offered in evidence the following receipt: "$50.00. December 10th 1849. Received of A. H. Fuller fifty dollars, which is to account to me on settlement.

"Luther Shattuck."

He testified to a demand for a settlement, repeatedly made before suit brought; that he paid the fifty dollars for which the receipt was taken upon an account running between him and the defendant for sleepers and other things; and that he had received the sleepers of the defendant.

The defendant in his answer alleged that the fifty dollars were given him by the plaintiff in part payment for a lot of trees and timber sold and delivered by him to the plaintiff and one Fitch; that he commenced a suit against said Fitch and the plaintiff to recover payment for said trees and timber, and in September 1851 recovered judgment against them for $160.80 and costs, for which execution issued.

There was also evidence that the defendant had admitted the receipt of money from the plaintiff in different sums, one of which was the said fifty dollars, amounting in the whole to eighty five dollars, and that he owed the plaintiff that amount, and was willing to allow it, and to have it deducted out of an execution which he held against the plaintiff.

The presiding judge ruled, that inasmuch as the plaintiff admitted having received the sleepers on account of which h

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paid the fifty dollars, he could not maintain this action; and we think his ruling was right.

The plaintiff rests his claim upon the familiar principle that an action for money had and received will lie, when a defendant has received the money of the plaintiff, which he has not the right conscientiously to retain. But it is difficult to see why the defendant cannot conscientiously retain this money. It was paid to him in satisfaction of an existing debt. It was money due to him; and, when paid, became his money. He was bound to account for it, that is, upon a settlement, to admit the payment; but not to repay it or any part of it. It paid the debt, which was, to that extent, thereby satisfied and extinguished; and so it was received and retained upon a full consideration. If, after this payment, the defendant had attempted to enforce his original claim, the plaintiff could have availed himself of it as a defence. If the defendant had demanded and accepted payment of the same sum a second time, it would be the second payment, and not the first, which would be erroneous or wrongful.

But in any form of action, and under any statement of the plaintiff's case, the objections to the maintenance of this claim are equally decisive. It in effect assumes, that if a partial payment is made on account of a debt, upon which the creditor afterwards brings a suit and recovers judgment, the debtor can recover back the sum which he paid, by proving that it was not credited to him in computing the amount of the judgment. It is well settled, both upon principle and authority, that no such proof is open to him. The time for it has gone by. He has had his day in court. It was the very thing that he might and should have proved in the suit in which the judgment was recovered. To allow him to bring an action, and support it by such proof, would be to allow him to try over again one of the issues decided by the judgment; which the law does not allow. If a part of the debt had been paid before the judgment was recovered, then the whole was not due. But the judgment is the solemn adjudication of the court, between these parties, that the whole was due. Each party had full opportunity to be

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heard, and there must be some end of litigation. "It certainly is a principle admitted by all courts in the abstract," says Chief Justice Parker in *Homer* v. *Fish*, 1 Pick. 439, "that a matter of controversy, which has been inquired into and settled by a court having jurisdiction of the subject, cannot be drawn into question again, in another suit between the same parties, for the purpose of defeating or avoiding the effects of a judgment of the court to which it has been submitted." "It is sufficient that the action was of a nature to admit of such a defence, and that the plaintiff in the new suit might have availed himself of the same subject matter in the former one." p. 441.

The same rule was applied in the recent case of *Sacket* v. *Loomis*, 4 Gray, 148, which is identical in principle with the case at bar.

An exception to the general course of authorities upon this subject is indeed to be found in the case of *Rowe* v. *Smith*, 16 Mass. 306, in which the opinion is given by Chief Justice Parker. He says, "Our first impression was against this action; but upon further consideration we think it can be maintained." The action was to recover back a sum of money which had been paid, but not indorsed, upon a note, the holder of which had afterwards sued it and recovered judgment for the whole sum appearing to be due. We are constrained to believe that the "first impression" of the court was correct, and that the "further consideration" bestowed upon the case was addressed rather to its particular hardship, than to the general and salutary principles of law which should have controlled it. It is impossible, in our judgment, to reconcile the decision with the maturely considered doctrine of the same eminent magistrate in *Homer* v. *Fish;* and it is undoubtedly in conflict with the general current of decisions in this commonwealth. It must be considered as overruled. *Exceptions overruled.*

E. A. Kelly, for the plaintiff.

B. F. Butler & W. P. Webster, for the defendant.

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SARAH A. WILSON *vs.* JAMES MELVIN.

In an action to recover the price of intoxicating liquors, the burden of proof is upon the defendant to show that they were unlawfully sold.

BY THE COURT. This action is upon an account annexed to the plaintiff's writ, as follows: "May 20, 1856. To 142 gallons elderberry wine at 75 cents, $106.15."

The defence was that the wine was an intoxicating liquor, and that the sale was made in violation of law. No evidence was introduced on either side upon the question whether the plaintiff was licensed to make the sale. The presiding judge ruled that the burden of proof was upon the defendant to satisfy the jury that the plaintiff was not licensed according to law to make the sale, or, if licensed, that he sold it in a manner or for a purpose prohibited by law. We are of opinion that the instructions were correct. The sale of wine or other intoxicating liquors is a valid contract at common law. Such liquors are property, and may be purchased, and a debt be thereby created, except in those cases where the sale is prohibited by statute. The statute upon which the defendant relies does not make all sales unlawful, but only sales by unlicensed persons. *St.* 1855, *c.* 215. There is no legal presumption that the sale is unlawful, and there should hardly be, in favor of a defendant who has himself joined in the contract. As against the Commonwealth, the legislature have required that the defendant in a criminal prosecution shall prove the authority under which he acts, when charged with a violation of the statutes prohibiting the unlicensed sale of intoxicating liquors; *St.* 1844, *c.* 102; but they have imposed no such obligation upon parties who seek the enforcement of contracts. *Exceptions overruled.*

A. F. L. Norris, for the defendant, cited 1 Greenl. Ev. § 79; *Carlton* v. *Bailey*, 7 Foster, 230; *Kingsley* v. *New England Mutual Fire Ins. Co.* 8 Cush. 393; *Borthwick* v. *Carruthers*, 1 T R. 648.

A. R. Brown, for the plaintiff.

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Perez R. Jacobs *vs.* Daniel B. Measures.

An assistant clerk, appointed by the court under legislative authority, may sign, in the absence of the clerk, writs required by the Constitution to be signed by "the clerk of such court," although the Constitution now requires "clerks of courts" to be elected by the people.

The assistant clerk of the courts in Middlesex is authorized by the St. of 1851, c. 88, § 2, to sign precepts, although the clerk is acting as such in another town within the county.

Action of tort for an assault and battery. Answer, that the defendant was resisting the plaintiff in making an unlawful arrest in the defendant's dwelling-house.

At the trial in the court of common pleas in Middlesex at December term 1858, the plaintiff proved that he was a deputy sheriff in that county, and on the 6th of May 1856 received a *capias* in due form of law from that court, signed by "M. Preston, assistant clerk," with orders to take the body of Francis Measures named therein, and went to the house of the defendant, where said Francis lived and then actually was; that the plaintiff demanded an entrance, and being refused by the defendant, with threats of violence if he entered, broke open the door and arrested Francis, and while so in the house received from the defendant the injuries complained of; but he admitted that the force used by the defendant was not excessive if the plaintiff was unlawfully in the house.

When the *capias* was issued, the clerk of the court was at Lowell in said county, in attendance upon the supreme judicial court then sitting there.

The defendant contended that upon this evidence the action could not be maintained, and *Sanger*, J., "for the purpose of the trial," so ruled. A verdict was taken for the defendant, and the plaintiff alleged exceptions, which were argued at Boston in February 1859.

J. Q. A. Griffin, for the plaintiff.

B. F. Butler, for the defendant. 1. By the Constitution of Massachusetts, c. 6, art. 5, "all writs, issuing out of the clerk's office in any of the courts of law, shall be signed by the clerk of

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such court." And by the nineteenth article of amendment of the Constitution, adopted in 1855, "clerks of the courts" must be chosen by the people." Since that amendment, the duties required of the clerk by the Constitution cannot be performed by an officer not so elected. *People* v. *Warner*, 7 Hill, 81, and 2 Denio, 272. The assistant clerk of the courts in Middlesex is not elected by the people, but is appointed by this court. *St.* 1851, *c.* 38, § 1.

2. If the legislature can authorize the performance of such duties by a clerk not elected, they have not done so in this case. The powers conferred upon him are only to "authenticate papers and perform such other duties of the clerk as shall not be performed by him, and, in case of the absence, neglect, removal, resignation or death of the clerk," to "complete and attest any records remaining unfinished, and act as clerk of the courts until a new clerk be appointed and qualified." *St.* 1851, *c.* 38, § 2. This does not authorize him to sign original precepts, at least when the clerk is within the county and acting as clerk. And the right of the assistant to act should appear on the face of the precept.

METCALF, J. An officer, in the execution of valid criminal process, is justifiable in breaking the outer door of a dwelling-house, after demanding admittance and being refused. This is not questioned by the defendant. The single question in this case therefore is, whether the assistant clerk had authority to sign the process in the service of which the plaintiff broke the defendant's door. If he had that authority, then that process was lawful on its face, and the plaintiff is entitled to maintain this action. The assistant clerk's authority is denied by the defendant, for the reason that, by the Constitution of the Commonwealth, "all writs issuing out of the clerk's office in any of the courts of law shall" (among other things) "be signed by the clerk of such court." It is contended that an assistant clerk is not "the clerk," within the meaning of the Constitution. But a majority of the court are of opinion that any person who is lawfully authorized to act as clerk and do the duties of clerk is "the clerk" who is authorized to sign writs issuing from the

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clerk's office. Such is the long settled practical construction of this part of the Constitution.

By *St.* 1782, *c.* 9, establishing a supreme judicial court, it was enacted that "all writs and processes" of the court should be (among other things) "signed by the clerk." There was the same enactment in *St.* 1782, *c.* 11, establishing courts of common pleas. Yet, in the first of these statutes was this direction "The justices of the supreme judicial court shall, from time to time, appoint a clerk, or clerks, to attend said court, and to record the proceedings thereof, and to do all other things which shall be by law their duty to do." And such has ever since been the statute law, till, by the recent change in the Constitution, clerks were made elective officers. *St.* 1830, *c.* 129. Rev. Sts. *c.* 88. Whenever the court, by virtue of that statute law, appointed two clerks, each of them was always deemed "the clerk" authorized to sign all writs and processes, and each did sign them. On the construction of the Constitution, now contended for, we do not see how any processes, so signed, were lawful. For the words "the clerk," on that construction, are not applicable to two clerks, or to either one of two rather than the other. Neither could have been "the clerk," unless each was.

When we find that, within two years after the Constitution went into operation, the legislature (of which many members had been in the convention which framed that constitution) passed the act of 1782, *c.* 9, copying into it the provision of the Constitution concerning the signing of writs, and then providing for the appointment of more than one clerk, it is manifest that they could not have understood that, by the Constitution, only one person in a county could be "the clerk" of the court, who could rightfully sign writs and processes. The contrary is inevitably to be inferred from their legislation; and as the construction thus given to the Constitution has been adopted and acted upon for nearly fourscore years without question, it is too late to hold otherwise now, even if we could entertain a doubt as to the construction which we should deem right, were the point now raised for the first time.

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Within a few years, this court has been authorized to appoint assistant clerks, whose duties and authority are set forth in the statutes authorizing their appointment. By the act under which the assistant clerk in this county was appointed, (*St.* 1851, *c.* 38,) he is authorized to "authenticate papers, and perform such other duties of the clerk as shall not be performed by him; and in case of the absence, neglect, removal, resignation or death of the clerk, may complete and attest any records remaining unfinished, and act as clerk of the courts in the said county until a new clerk be appointed and qualified." This, in our opinion, gave the assistant clerk authority to sign the process which was served by the plaintiff. The signing of it was one of the duties of the clerk, but, for a good reason, "not performed by him." *Exceptions overruled*

JOSHUA CONVERSE *vs.* GEORGE JENNINGS.

A tender of the amount due for taxes on land advertised for sale for nonpayment of taxes, but not yet sold, need not include any fees of the collector for a levy upon the land, or for travel to make a return to the state and county treasurers, or for a commission on the tax.

ACTION OF CONTRACT by a mortgagee in possession of lands in Needham, sold for nonpayment of taxes, against the collector of taxes, to recover back money paid under the following circumstances, which were agreed by the parties:

The lands were duly assessed to the mortgagor, for the state county and town taxes for 1857, and advertised for sale. Two days before the time appointed for the sale, the plaintiff tendered to the defendant payment of the taxes; but the defendant refused to receive them and stop the sale, and required, to redeem the lands and prevent the sale, the following additional sums, as legal costs and charges thereon: On each lot, $1.10 for a "levy;" $1.00 for "travel to make returns to respective state, county and town treasurers, twenty five miles at four

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cents per mile;" "four per cent. on amount of tax levied;" and sixty five cents for advertising. And the plaintiff paid these charges under protest.

This case, which was pending in the county of Middlesex, was argued at Boston in February 1859.

D. S. Richardson, for the plaintiff.

C. R. Train, for the defendant.

Dewey, J. The defendant, on a warrant held by him as a collector of taxes, illegally demanded and received of the plaintiff certain sums of money, which may be properly recovered back in the present action. The mere fact of advertising the plaintiff's land for sale for nonpayment of taxes did not give the collector the right to charge $1.10 for a levy on each parcel advertised or any of them, nor a fee "for travel to make returns on warrants to the State, county and town treasurers, at the rate of four cents a mile," nor a commission of four per cent. on the amount of the tax.

It is true that the Rev. Sts. *c.* 122, § 21, enact that "in all cases, not expressly provided for by law, the fees of all public officers, for any official duty or service, shall be at the same rate as those prescribed in this chapter for the like services." The proceedings by a collector who receives payment of the tax, after advertising, and before a sale by auction of the land taxed, are not sufficiently like those of a sheriff or his deputy who has satisfied an execution by a levy upon real estate, to make the above statute applicable to a collector who has merely advertised the property, and thereupon received the amount of the tax. The sheriff receives his entire compensation for his services, by the fees taxed on the execution, and he is, in each case, required to return such execution, with his doings thereon, to the clerk's office. The collector, on the other hand, has his compensation, for ordinary services, paid wholly by the town, when collecting under his general warrant. In case of no person appearing to pay the taxes at the time and place appointed for the sale, the land is advertised, and the collector is to sell so much as shall be sufficient to discharge such taxes and all necessary interven ing charges.

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Without deciding what charges would be proper in case of a sale, the court are of opinion that in case of payment of a tax, before sale, the charges to the extent here made were unauthorized. There was no levy upon the land. There was no return to be made of the proceedings of the collector as to the taxes assessed upon the plaintiff. When received, they were, like all other payments, to be duly accounted for by the collector. He had a right to be compensated for all the expenses of advertising the land, and his incidental expenses connected therewith, and this might properly be added to the sum to be paid to discharge the tax. The charges for levy $1.10, and $1,00 for travel to make return of the warrant, and a commission of four per cent. on sales were unauthorized.

The case of *Howard* v. *Proctor*, 7 Gray, 129, where a commission of four per cent. was allowed, was a case of an actual sale of land for taxes. That a party may pay the taxes at the time and place appointed for the sale of his real estate, is directly assumed in the Rev. Sts. *c.* 8, § 28. When he does thus pay the same, the collector will be entitled to all necessary intervening charges connected with the advertising, and for his attend ance at the time an[1] place of sale. *Judgment for the plaintiff.*

Moses F. Tate *vs.* Citizens' Mutual Fire Insurance Company.

On a contract of insurance with two jointly on their joint property, one cannot sue alone, without proof of an assignment to him of the other's interest, and of the company's assent thereto.

An agent of an insurance company, to receive premiums and applications for insurance, and transmit policies, has no authority to waive notice of an assignment of a policy.

Action of contract on a policy of insurance made by the defendants to "Moses F. & James C. Tate," "on their stock and tools in their tannery in Charlestown," for one year from

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the 3d of April 1855. The application, which was made part of the policy, described them as copartners. Trial in the court of common pleas in Middlesex, before *Bishop*, J., who signed this bill of exceptions:

"It appeared that after the making of the policy, and before the property was damaged by fire, James C. Tate conveyed all his interest in said property to Moses F. Tate. It also appeared that part of the property destroyed belonged to one Carleton, and another part to one Fernald, and was only in possession of said Tate to be manufactured.

"The plaintiff introduced James K. Frothingham, who testified that he was at the time of making said policy, and ever since, the agent of the defendants; that he obtained policies for said Tate, in this and other offices; that he was not authorized to bind the Citizens' Office by any contract or agreement, or give any assent in behalf of said office; but his authority extended merely to receiving applications and forwarding them to the office, receiving the policies and delivering them to the parties insured, receiving and receipting for premiums paid; that when any parties insured wished to make any change of the property insured, if they notified him, he notified the office, but that he had no authority in behalf of the office to make any change; that in May 1855 the plaintiff informed him that he had bought out his brother's interest in the business, including the property insured, and the witness told the plaintiff that in his opinion it made no difference in the insurance, and that he did not think it necessary to notify the office, and that no notice was given to the office by the witness, or to his knowledge. There was no other testimony that the office ever received notice of the conveyance of the property from James C. Tate to Moses F. Tate before its loss, or assented to the same.

"The defendant requested the presiding justice to instruct the jury that the plaintiff, to recover, must prove not only that the interest of James C. Tate in the property had been conveyed to him, but also that the policy of insurance had been assigned to him, and that the company had been notified of the assign-

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ment, and had consented to the same. This instruction the judge gave, adding that the assignment need not be upon the policy, but might be made on another paper, and that a waiver of notice would answer the same purpose as assent, and gave instructions as to waiver, not excepted to.

"The defendants also requested the judge to rule that they were not liable, if the plaintiff notified said Frothingham as stated in said Frothingham's testimony, and said Frothingham told him he did not think it necessary to notify said company, and said company were not notified; or if said company were notified, and did not assent to the transfer of said property, and to the assignment of said policy, if any there was; that as said policy was a written instrument, the assignment by James C. Tate of his interest to the plaintiff, if any there was, must have been in writing; that there could have been no waiver of the legal rights of the company, as to notice of alienation, assignment of policy, and consent to the same by the president or other officer of the company, after the loss of the property insured, without an express agreement so to do; and that if the plaintiff is entitled to recover, he can recover only the amount of his interest in the property destroyed, after deducting the amount belonging to said Carleton and said Fernald.

"The judge refused to give any of these instructions, and instructed the jury that the plaintiff should recover the interest he had in the property on manufacture. To all of which the defendants excepted."

This case was argued at Boston in February 1859, by *J. G. Abbott*, for the defendants, and *J. Q. A. Griffin*, for the plaintiff.

Bigelow, J. The contract of insurance in this case was made with two persons jointly. They are described as copartners in the application, which is referred to in the policy, and the property covered by the insurance is stated to belong to them both. It is a case where the form of the contract is joint, and where the legal interest in the subject matter of the contract is vested in two jointly. Upon familiar principles, both the joint contractors should join in bringing an action for a breach of the

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contract, and the omission to join them is a good defence, either in abatement or under the general issue.

The sole ground therefore, on which an action on the policy can be maintained in the name of one of the joint contractors is, that the interest of the other joint contractor was assigned to the present plaintiff, who seeks to recover in this action in his own name only. But the difficulty which the plaintiff has to overcome in order to support this suit is, that an assignee of a chose in action cannot support an action in his own name, but must proceed in the name of the assignor, unless he can show a notice of the assignment to the other party to the contract, and his assent thereto. *Wilson* v. *Hill*, 3 Met. 69. *Fogg* v. *Middlesex Mutual Fire Ins. Co.* 10 Cush. 345, 346.

In the present case, it is expressly found in the exceptions, that no notice of the assignment of the interest of one of the assured in the policy to the other joint contractor was ever given to the defendants. The agent, Frothingham, was only a special agent to receive applications for insurance, and had no power to bind the defendants by any contract. *Hale* v. *Mechanics' Mutual Fire Ins. Co.* 6 Gray, 169. *Kimball* v. *Howard Fire Ins. Co.* 8 Gray, 37.

There was therefore no ground on which the plaintiff could maintain this action in his own name only. The instructions given to the jury therefore, however correct and true as abstract propositions, were wholly inapplicable to the case proved, and the verdict found for the plaintiffs must be set aside as being the result of a mistrial.

Without some other proof of an assent by the defendants to the assignment, the plaintiff can recover only by joining his co-contractor as a plaintiff. *Exceptions sustained.*

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Edwin A. Luce *vs.* Theodore G. Mayhew & others.

A certificate of the number of votes given for county commissioner at a town meeting duly held for that purpose, and of the result thereby appearing, signed "Attest, J. S.," without showing that it is a copy of the town record, or that J. S. is town clerk, is not a return which the board of examiners are authorized to receive, or will be required by mandamus to consider, in determining who is elected county commissioner.

Hoar, J. This case arises upon an alternative writ of *mandamus*, issued upon the petition of Edwin A. Luce, of Tisbury, in which the petitioner alleges that he was duly elected a county commissioner for the county of Duke's County, at the election in November 1858; that the board of examiners for that county met according to the requirements of law; that by the returns made to said examiners it appeared that the petitioner had received the highest number of votes at said election; that it was thereupon their duty to declare the petitioner to be duly elected to said office, and forthwith to give him a written notice to that effect, in due form of law; that they have neglected and refused to declare him duly elected as such commissioner, and to give him written notice of his election; but on the contrary, have given a certificate of election to said office to William S. Vincent, who was not legally elected thereto.

The writ was served upon the examiners, who appeared at May term 1859 in Barnstable, and showed cause why a peremptory *mandamus* should not issue; and notice of the pendency of these proceedings was given, by order of the court, to William S. Vincent, the incumbent of the office.

At the hearing it was proved and admitted, that when the board of examiners met to examine the returns of votes transmitted to them, papers purporting to be returns of votes from each of the three towns in the county of Duke's County were received by them; that they rejected the returns from the towns of Tisbury and Chilmark, as not being made in conformity with the requirements of law; that William S. Vincent had a large majority of the votes given in the town of Edgartown, from which town a correct return was received, and that he was

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thereupon declared duly elected, and a certificate of his election was given to him.

It also appeared that if the returns from Tisbury and Chilmark had both been received and counted, the petitioner would have been entitled to the certificate of election; but that if either of them were rejected, the result of the election would be the same as if the vote of Edgartown alone were counted; the plurality for Luce in either not being in itself sufficient to counterbalance the plurality for Vincent in Edgartown.

The question then arises whether the returns from either town were rightly rejected by the board of examiners. The only return received by them from the town of Chilmark was the following:

"At a legal meeting of the inhabitants of the town of Chilmark, in Duke's County and Commonwealth of Massachusetts, qualified to vote in elections, holden on the second day of November, in the year eighteen hundred and fifty eight, for the purpose of voting for a county commissioner for said county, the votes given in were sorted, counted, recorded and public declaration thereof made, and were for the following persons:

Whole number of ballots . . . forty four.
Edwin A. Luce . . . . . thirty one.
William L. Vincent . . . . . thirteen.

Tristram Mayhew, Smith Mayhew, Moses C. Vincent, } Selectmen of Chilmark.

Attest: Jas. N. Tilton."

Two objections are made to the validity of this return: 1. That it does not purport to be a copy of the town record; and 2. That it does not purport to be attested by any town clerk.

The statutes from which the powers and duties of the board of examiners are derived are the Rev. Sts. *c.* 14, §§ 17, 18, 19, 38; *Sts.* 1854, *c.* 77; 1855, *c.* 3.

It is obvious, from an examination of these statutes, that the duties of the board of examiners are simply ministerial. By § 18, of *c.* 14 of the Rev. Sts., they are required to meet at a time

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specified, and to "examine the returns of votes transmitted to them, and, if any person shall be found to have a majority of all the ballots," to give the person elected written notice of his election. By subsequent statutes, the time of their meeting is changed, and a "plurality" of votes is substituted for a "majority." They are not made a judicial tribunal, nor authorized to decide upon the validity or the fact of the election, in any other mode than by an examination of "the returns" made to them, according to law. They are not required or authorized to hear witnesses, or weigh evidence. They have no power to send for persons or papers. If one result appears upon the returns, and another is the real truth of the case, they can only act upon the former. If they have done their duty, the remedy of the person actually elected to the office is not to be sought in a *mandamus*. This court has no power to direct public officers to do any more than their duty, or anything different from their duty.

The decision of the case must then depend upon the answer to be given to the question, whether the paper received from the town of Chilmark was a "return," such as the law prescribes, and which the board of examiners were required by law to examine and treat as a legal return. The court are of opinion that it was not. It does not purport to be a copy of a town record, but is a certificate, apparently original, of certain facts which it recites. It is not attested by any person describing himself, or in any way appearing upon the paper to be, the town clerk of Chilmark. The board of examiners had no official knowledge, and were not required to ascertain or know, that the person signing his name "Jas. N. Tilton" was in fact such town clerk. The "return" required by Rev. Sts. *c.* 14, § 17, is a copy of the town record, signed by the selectmen and attested by the town clerk. The board of examiners were not required by law to receive, examine or treat as a return any paper which did not appear upon its face to be such a return. The respondents having therefore sustained the issue raised upon their answers, are entitled to a judgment for their costs.

Judgment for the respondents for costs.

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G. Marston, for the petitioner, cited *Strong, petitioner*, 20 Pick. 484; *Ellis* v. *County Commissioners*, 2 Gray, 370; *Taft* v. *Adams*, 3 Gray, 126.

J. M. Day, for the respondents, cited *Strong, petitioner*, 20 Pick. 491, 492, 497, 498; *Warren* v. *Mayor & Aldermen of Charlestown*, 2 Gray, 84; *Commonwealth* v. *Ayer*, Mass. Election Cases, (ed. of 1852) 682, 683, 685.

LUTHER L. SHORT *vs.* DAVID WOODWARD & others.

An agreement to take a certain annual compensation for damages occasioned by flowing land by a milldam is not an agreement for the sale of an interest in lands, within the statute of frauds.

The owner of a mill, under an agreement authorizing him to "keep his dam to the jury mark, and no higher," may vary, repair or use his dam as he pleases, if he raises no part of the dam higher than that mark.

An agreement to take a certain annual compensation for the flowing of land by a milldam, "if the owner of the mill would keep his dam to the jury mark, and no higher," cannot be considered as terminated by such owner's raising the water and the dam, by the addition of flashboards, above the mark for two seasons, if the owner of the land flowed gives receipts in full for his damages at the rate agreed upon during those years and afterwards, without giving any notice that he considers the agreement terminated.

The terms of an oral contract, when clearly proved, and intelligible and explicit, are to be construed by the court, and not by the jury.

HOAR, J. As a defence to a complaint for flowing the complainant's land by a milldam, the respondents relied upon an oral agreement to take the sum of five dollars a year, payable once in two years, so long as the dam should be kept at a certain height, for a summer pond, in full satisfaction of damages. The verdict being for the respondents in the court of common pleas, the complainant takes exceptions.

1. The exception, that the agreement was a contract for the sale of lands, or of an interest in or concerning them, and so invalid under the statute of frauds, cannot be supported. The interest in the lands is conferred by the statute; the contract only fixes the amount to be received in satisfaction of a pecu-

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niary claim. The precise point was decided in *Smith* v. *Goulding*, 6 Cush. 154.

2. The contract being that "if the respondents would keep their dam to the jury mark, and no higher, the complainant would take five dollars a year," the complainant offered evidence that the respondents, by shortening their waste way, had prevented so free a passage of the water as before, and thus raised the water above the height of the mark fixed by the jury. We think this evidence was rightly excluded. Where, by prescription or grant, the right to maintain a particular dam has been acquired, this court has held that the right to tighten and repair such dam was included, although the consequence might be a greater flowing of the lands above. *Cowell* v. *Thayer*, 5 Met. 258. But in this case the agreement was explicit, and established the compensation for flowing caused by keeping the dam at a height not above the jury mark. We do not perceive that the existing height of the dam has anything to do with the interpretation of this contract. If the whole dam had been, at the time the bargain was made, two feet below the jury mark, the respondents might certainly have raised it. They were not confined to a dam of any particular construction, but might vary, repair or use the dam according to their pleasure, and pay but five dollars a year to the plaintiff, if no part of the dam exceeded the height agreed on.

3. The complainant offered to show that during the years 1852 and 1853, times not covered by the complaint, the respondents had used flashboards on their dam, and by that means raised their dam, and the water, above the jury mark. This evidence was rejected, and we think if it had stood alone its rejection would have been erroneous, and a ground for a new trial. The contract was by its terms to continue only so long as the respondents kept their dam no higher than the jury mark.

But it further appeared that up to December 1854 the defendants had biennially paid to the plaintiff, and the plaintiff had given his receipts in full for flowing at the rate of five dollars a year. There was no offer to show that the plaintiff had given any notice that he considered the contract terminated, or was

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proceeding upon any other basis than the contract. We think this was a waiver of his right to avail himself of the respondents' violation of the contract, and a recognition of it as subsisting and obligatory upon the parties, after the flashboards had been erected and removed.

4. The complainant contended "that the true meaning and construction of the contract between the parties was not that the respondents might keep the dam to the jury mark, but that they were to keep the pond or water to the jury mark; that the construction of the contract was a question of fact for the jury, and that he had a right to argue to them from the acts and declarations of the parties that they so understood the contract."

But the complainant himself testified to the terms of the contract, and there was no evidence to the contrary. These terms were intelligible and explicit, and there was nothing ambiguous or uncertain either in the language or the subject matter to which it applied. In such a case, the interpretation and construction of the contract, that is to say, the determination of the legal rights and liabilities which it creates between the parties, was rightly held to be for the court, and not for the jury. *Wilmarth* v. *Knight*, 7 Gray, 294. *Exceptions overruled*

E. H. Bennett, for the complainant.

C. I. Reed, for the respondents.

STEPHEN BENEDICT *vs.* JOHN PARMENTER & others & Trustee.

An assignment for the benefit of creditors, made by a citizen of another state, in that state, and valid by the laws of that state, holds property remaining in that state, as against a trustee process brought in this state by a citizen of that state against the assignee, who resides here.

HOAR, J. It appears by the answer of Benjamin W. Hood, who is summoned as trustee in this action, that he was not indebted to the principal defendants, and had no goods or effects

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of theirs in his possession, except under an assignment in trust, to be appropriated, first to the payment of certain debts of the assignors in full, then to all other debts which should be presented and proved to the assignee within six months, and any surplus to the assignors. The plaintiff and defendants are citizens of Rhode Island, and the assignment was made in that state. It is established to our satisfaction, that this assignment was valid and effectual under the laws of Rhode Island.

The question then arises whether the trustee can be charged upon this state of facts; and the court are of opinion that he cannot. He took the property by a title indefeasible where the transaction took place. The property has never been brought under the jurisdiction of this commonwealth, and we are not aware of any obligation resting upon the assignee to bring it into this commonwealth for the purpose of enabling a citizen of Rhode Island to obtain a remedy which the laws of his own state would not give him. It was held, in *Fall River Iron Works* v. *Croade*, 15 Pick. 11, and more recently in *Zipcey* v *Thompson*, 1 Gray, 243, and *Boyd* v. *Rockport Steam Cotton Mills*, 7 Gray, 406, that such an assignment, made in another state, though it might be valid to pass the property in the state where it was made, would not be such an assignment of a debt due from a citizen of this commonwealth as to defeat an attachment, subsequently made, by a citizen of this commonwealth But in no case has it been held that an attachment by a citizen of the state where the assignment was made would be effectual against it, or that the residence of the assignee in this commonwealth could alter the nature of his title to the property conveyed to him for a specific and lawful purpose under another jurisdiction. The case of *Wales* v. *Alden*, 22 Pick. 245 is a decisive authority to the contrary. *Trustee discharged.*

W. W. Blodgett, for the plaintiff.

C. B. Farnsworth & C. W. Thrasher, for the trustee.

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GENERAL MUTUAL INSURANCE COMPANY *vs.* WILLIAM PHILLIPS.

The provisions of the Rev. Sts. *c.* 37, § 40, (which required each agent of a foreign insurance company to deposit a copy of their charter and of his power of attorney with the treasurer of the Commonwealth,) applied to mutual insurance companies.

HOAR, J. This is an action of contract upon a promissory note dated May 7th 1845, given by the defendant as a premium of insurance. The plaintiffs are an insurance company incorporated in the State of New York on the mutual principle; the contract of insurance, in consideration of which this note was given, was made in this commonwealth through an agent of the plaintiffs; and such agent had not, at the time of making such contract, complied with the provisions of the Rev. Sts *c.* 37, in relation to foreign insurance companies.

These facts are decisive of the case, and render a decision of any other points which were raised at the trial unnecessary The consideration of the note was a contract on the part of the insurance company, made by an agent, which he was prohibited from making by the laws of this commonwealth. The payee of the note could therefore maintain no action upon it. The provisions of the Rev. Sts. *c.* 37, § 40, were applicable to mutual insurance companies as well as others. *Williams* v. *Cheney*, 3 Gray, 222. *Washington County Mut. Ins. Co.* v. *Dawes*, 6 Gray, 379. *Plaintiff's exceptions overruled.*

L. F. Brigham & J. C. Stone, for the plaintiffs, contended that the provisions of the Rev. Sts. *c.* 37, were not applicable to foreign insurance companies doing business on the mutual principle, before the *St.* of 1847, *c.* 273, § 3, which was not passed until after this contract was made.

T. D. Eliot & T. M. Stetson, for the defendant.

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JOHN C. EDLER *vs.* ARCHIBALD THOMPSON.

Nonjoinder of a defendant in an action of contract must be pleaded in abatement.

ACTION OF CONTRACT for work and labor. Answer, a denial of the services, and payment.

At the trial in the court of common pleas in Bristol, the defendant testified that the plaintiff's claim was for services rendered to the firm of Thompson & Company, consisting of the defendant and another; and objected that if the services were rendered to Thompson & Company, the plaintiff could not recover against this defendant alone, because the writ and declaration were against him individually, and it did not appear from the record that the plaintiff intended to present a claim against any one else. But *Briggs*, J. overruled the objection.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions, which were argued in writing.

J. Daggett, for the defendant. Where it appears from the record that other defendants should have been joined, such nonjoinder must be pleaded in abatement; but when it first appears by the evidence at the trial, it may be taken advantage of under the general issue. Story Pl. 20, and cases cited. *Ruggles* v. *Patten*, 8 Mass. 480. *Barstow* v. *Fossett*, 11 Mass. 250. *Sumner* v. *Tileston*, 4 Pick. 308.

J. B. Sanford, for the plaintiff. Nonjoinder of a defendant in an action can be taken advantage of by a plea in abatement only. *Hart* v. *Fitzgerald*, 2 Mass. 509. *Baker* v. *Jewell*, 6 Mass. 460. *Converse* v. *Symmes*, 10 Mass. 377. *Thompson* v. *Hoskins*, 11 Mass. 419. Rev. Sts. *c.* 100, § 1. Here the defendant has not pleaded it at all.

HOAR, J. That in an action of contract the defence of nonjoindet of a defendant can only be made available by a plea in abatement, has been too often decided in this commonwealth to be an open question. *Exceptions overruled, with double costs.*

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GEORGE C. S. CHOATE, Treasurer of the State Lunatic Hospital at Taunton, *vs.* INHABITANTS OF ROCHESTER.

A man does not obtain a settlement, under the Rev. Sts. *c.* 45, § 1, *cl.* 4, in a town where he owns a freehold, if before he has lived thereon for three years successively he is committed to the state lunatic hospital and there supported as a pauper; although his family continue to reside on his land for the residue of the three years.

ACTION OF CONTRACT by the treasurer of the State Lunatic Hospital at Taunton, under *St.* 1857, *c.* 209, to recover the expenses of supporting Edward B. Durfee, a lunatic pauper. The case was submitted to the decision of the court upon the following facts:

On the 19th of March 1852 Durfee purchased a dwelling-house in Rochester, and within a few days removed with his family into the same, he not having at that time any known legal settlement in this commonwealth. He continued to reside there with his family until the 6th of July 1853, when he was arrested for an offence, and, failing to recognize with sureties for his appearance at the ensuing term of the court of common pleas, was committed to the jail in Plymouth. On the 20th of July he was taken from jail, and committed by the judge of probate to the State Lunatic Hospital at Worcester, as an insane person, and there remained until the 22d of February 1854, when he was discharged and returned to his house in Rochester, and continued to reside there until the 8th of August 1854, when he was sent to the house of correction as a disorderly and dangerous person, and there remained until the 11th of November 1854, when, on complaint of the overseers of the house of correction, he was committed by the judge of probate to the State Lunatic Hospital at Taunton, where he has since been supported as a pauper. His wife and some of his children have continued to live upon his place in Rochester.

This case was argued at Taunton at October term 1858.

L. F. Brigham, (District Attorney,) for the plaintiff. As the pauper's family lived upon his freehold estate in Rochester, his

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occasional and enforced absences from it did not prevent his acquiring a settlement in that town. Rev. Sts. *c.* 45, § 1, *cl.* 4. *Abington* v. *Boston*, 4 Mass. 312. *Granby* v. *Amherst*, 7 Mass. 1. *Buckland* v. *Charlemont*, 3 Pick. 173. *Hopkinton* v. *Upton*, 3 Met. 165. *Holyoke* v. *Haskins*, 5 Pick. 20. *Upton* v. *Northbridge*, 15 Mass. 259.

C. I. Reed, for the defendants.

METCALF, J. This action cannot be maintained, whether the court admit or deny the position taken by the plaintiff's counsel, that the enforced absences of the pauper from his estate in Rochester did not prevent his gaining a settlement there in the fourth mode prescribed by the Rev. Sts. *c.* 45, § 1, by having that estate and living on it three years successively; for he was supported as a pauper before he had lived three years on his estate. It is settled that no part of the time during which a person receives support or aid as a pauper can be computed as part of the three years. *East Sudbury* v. *Sudbury*, 12 Pick. 1. *Brewster* v. *Dennis*, 21 Pick. 236. *Taunton* v. *Middleborough*, 12 Met. 35. *Judgment for the defendants for costs.*

JOSHUA LOTHROP, JR. *vs.* WILLIAM IDE.

The return of a collector of taxes upon his warrant is only *prima facie* evidence in his favor, in an action against him for an unlawful arrest.

A collector of taxes has no right, under the Rev. Sts. *c.* 8, § 11, to take the body for non-payment of taxes, if sufficient property is shown to him upon which to levy; although fourteen days have elapsed since a demand of payment.

ACTION OF TORT against the collector of taxes of Seekonk, for arresting the plaintiff and committing him to jail upon a warrant in due form for the collection of a tax lawfully assessed upon him.

At the trial in the court of common pleas in Bristol, before *Briggs*, J., the arrest was proved; and the defendant relied, for his justification, upon his warrant, which contained, among other

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directions, the following: "If any person shall refuse or neglect, for fourteen days after demand thereof, to pay his tax, and you cannot find sufficient goods upon which it may be levied, you are to take the body of such person and him commit unto the common jail;" with his certificate thereon, which stated that, having demanded of the plaintiff the amount of his tax, "more than fourteen days previously to the date hereof, and not finding sufficient goods upon which it may be levied," he arrested the plaintiff's body for the tax, and committed him to jail. The plaintiff contended that this certificate did not show a justification of the arrest; but the judge overruled the objection.

The plaintiff then offered evidence that before the arrest he tendered the defendant sufficient personal property upon which to levy, and was permitted to introduce such evidence, although the defendant objected to its competency on the ground that it would contradict his official return.

Upon this evidence, the defendant contended that the plaintiff was not entitled to a verdict. But the judge proposed to rule that if the jury believed the evidence, the plaintiff was entitled to a verdict. Whereupon the defendant submitted to a verdict for the plaintiff, and alleged exceptions, which were argued at Boston in January 1859.

B. Sanford, for the defendant. 1. In this action, the return or certificate of the officer is conclusive evidence of the facts stated therein. The plaintiff's remedy, if any, is by an action for a false return. *Bruce* v. *Holden*, 21 Pick. 189. *Livermore* v. *Bagley*, 3 Mass. 513.

2. If this return is conclusive, it states a sufficient justification. Rev. Sts. *c.* 8, §§ 2, 11, 13. *Briggs* v. *Murdock*, 13 Pick. 305.

3. If the plaintiff's evidence was admissible, it did not support his action. The defendant was not bound to assume the responsibility of deciding whether the property offered him belonged to the plaintiff. If the defendant demanded payment of the tax, and did not within fourteen days thereafter find sufficient goods upon which to levy, he then had his election to collect the tax by arrest of the person, or by levy upon goods, if he should

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find any after that time. Rev. Sts. *c.* 8, §§ 7, 11. *Osgood* v. *Welch*, 19 N. H. 105.

E. H. Bennett, for the plaintiff. 1. The collector's certificate is only *prima facie* evidence in his favor, and not conclusive. *Bruce* v. *Holden*, 21 Pick. 187. *Pickard* v. *Howe*, 12 Met. 198. *Barnard* v. *Graves*, 13 Met. 94. *Caldwell* v. *Hawkins*, 40 Maine, 526. *Flint* v. *Whitney*, 28 Verm. 680.

2. If the collector's certificate is conclusive evidence of the facts stated in it, the defendant's certificate does not exclude the plaintiff's evidence, for it does not state that the collector "could not find sufficient goods;" Rev. Sts. *c.* 8, § 11; nor that "for want of goods" he took the body; Rev. Sts. *c.* 8, § 13; nor even that the collector made search for any goods.

3. If the plaintiff did offer the defendant sufficient property to levy upon, he had no right to take his body. The express words of the Rev. Sts. *c.* 8, § 11, and of the defendant's warrant, both make the fact that he "cannot find sufficient goods upon which it may be levied," a condition to the arrest of the body.

Dewey, J. The questions in the present case concern the admission and effect of the evidence offered by the plaintiff, that, prior to the actual arrest of the plaintiff for the nonpayment of his tax, he tendered to the defendant sufficient personal property that might have been levied upon to satisfy the same. The objection to its admission is that it contravenes the return of a sworn officer. The officer does not in the present instance directly aver that there were not sufficient goods of the plaintiff that might have been found to levy upon, but merely says, "not finding sufficient goods upon which it may be levied," he arrested the body. There is no allegation that he made search for the goods, or that the same might not have been found with proper diligence. Without deciding the more general question of directly contradicting a return of a collector of taxes, and whether, in a suit brought against such collector for an illegal arrest, his return is to be considered *prima facie* evidence merely, and presumed to be correct until the contrary be shown, it might perhaps be sufficient in the present case to say that no such direct averment is made here.

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But the court are of opinion that, in case of an action instituted against a collector of taxes for an illegal arrest, the certificate of the collector is not conclusive evidence in his favor. In cases of certificates of field-drivers, they have been treated as *prima facie* evidence of their doings rather than conclusive. In the somewhat loose language formerly used, they were said to change the burden of proof, by which language we understand, when used in reference to this class of cases, not a change of the technical burden of proof upon the issue, but that they are to avail until controlled by a greater weight of evidence overpowering them. In *Pickard* v. *Howe*, 12 Met. 207, it was considered as *prima facie* evidence, and also in the case of *Bruce* v. *Holden*, 21 Pick. 187. In the case of *Barnard* v. *Graves*, 13 Met. 94, it was said that the certificate of a collector of taxes, of his doings on a levy of his warrant, is to be deemed *prima facie* evidence as to all matters upon which they are by law to make returns. We have not felt that the decision in *Livermore* v. *Bagley*, 3 Mass. 513, should require us to come to a different result in the present case from that stated in *Barnard* v. *Graves*.

The evidence being admissible, we think it was such as would have warranted the jury in returning a verdict for the plaintiff. The authority to arrest the body, which is given by Rev. Sts. *c.* 8, § 11, arises only where the collector cannot find sufficient goods upon which to levy. This provision continues in force at all times previous to an act of arrest.

Exceptions overruled.

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William L. Slade & another *vs.* John Hood.

In defence of an action by the payee or his assignee in insolvency on a promissory note, it may be shown by parol evidence that it was given as collateral security for liabilities incurred by the payee at the request or for the benefit of the defendant, and that the payee suffered no loss by reason of such liabilities.

In an action on a promissory note, evidence that the defendant, at the same interview at which the note was given, gave another note to a third person, which had since been given up as made without consideration, is inadmissible to prove want of consideration of the note in suit; and if admitted by referees under a rule of court, who award in favor of the defendant, subject to the opinion of the court on the admissibility of the evidence, is ground for setting aside the award.

Action of contract by the assignees of George B. Hood, an insolvent debtor, upon a promissory note made to him.

Answer, that the note and a mortgage of even date therewith were made by the defendant to said Hood, to secure him against loss by reason of his having become responsible for the debts of John F. Moore at the defendant's request, and of his having indorsed notes of the defendant for the defendant's accommodation, and of an unsettled balance of account between him and the defendant; and that he had suffered no such loss; and that the plaintiffs had notice of these facts before commencing this action.

The case was referred by rule of court. At the hearing before the referees, the defendant offered to prove by oral evidence the facts stated in his answer. The plaintiffs objected to this evidence, on the ground that parol evidence was not competent to show that the note, which was absolute on its face, was given upon any condition. But the referees admitted the evidence as tending to show a want or failure of consideration of the note.

The residue of the report of the referees, as originally returned, was thus: "The testimony showed substantially that the note was given as security for any liability under which the insolvent was responsible for Moore, and also for any balance of account and claims that existed; it being then supposed by both the defendant and the insolvent that there was a balance due from the defendant to the insolvent. It also showed that the obligations on behalf of Moore were all discharged without loss to

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the insolvent; and by all the evidence in the case, it did not appear that any balance of accounts, or for mutual claims, was due from the defendant to the insolvent.

"The referees are of opinion that there was a failure of consideration for the note, so far as it was given for security of the defendant's liabilities on account of Moore; and a want of consideration, so far as it was given for a balance of accounts or claims. They therefore award, in case their determination respecting the admissibility of the evidence before stated is correct, that the defendant does not owe the plaintiffs as set out in their declaration, and that judgment be rendered for the defendant accordingly, and for his costs."

The referees afterwards, at the plaintiffs' request, and by leave of court, amended their report by inserting, just before the part above quoted, the following: "At the hearing the defendant offered to prove that on the same day and during the same interview in which the note declared on was executed, he gave another note, secured by mortgage on other real estate, to another person, and that that other person afterwards gave up said note and mortgage to him as having been given without consideration. To the admission of evidence for this purpose the plaintiffs objected. But the referees, or a majority of them, were of opinion that as said other note was given during the same interview in which the note declared on was executed, the facts so offered to be proved by the defendant were proper to be taken into consideration by the referees in determining the matters referred to them, and which the defendant had a legal right to prove before them. They accordingly admitted the evidence."

This case, which was pending in the county of Bristol, was argued at Boston in January 1859.

E. Williams, for the plaintiffs. Parol evidence is inadmissible to annex a condition to an absolute promise in writing in the form of a promissory note. *Allen* v. *Furbish*, 4 Gray, 504, and cases cited.

The evidence stated in the amendment of the report was irrelevant and inadmissible. 1 Greenl. Ev. §§ 52, 448. *Collins* v *Dorchester*, 6 Cush. 396.

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When arbitrators refer questions of law to the court, or manifest an intention to decide according to the true rules of law, the court will revise their errors in matter of law. *Bigelow* v. *Newell*, 10 Pick. 355. *Fuller* v. *Wheelock*, 10 Pick. 137. *Knight* v. *Wilder*, 2 Cush. 206. *Fairchild* v. *Adams*, 11 Cush. 554. *Boston Water Power Co.* v. *Gray*, 6 Met. 165, 166.

B. Sanford, for the defendant. Between the original parties to a promissory note or other contract, the total or partial want or failure of consideration may always be shown in defence, even by parol. Story on Notes, § 190 *& note*. *Grew* v. *Burditt*, 9 Pick. 270. *Hill* v. *Buckminster*, 5 Pick. 394. *Clapp* v. *Tirrell*, 20 Pick. 249. *Poyntell* v. *Spencer*, 6 Barr, 254. *Wearse* v. *Peirce*, 24 Pick. 142. *Wade* v. *Merwin*, 11 Pick. 287. *Underwood* v. *Simonds*, 12 Met. 278. *Parish* v. *Stone*, 14 Pick. 198. *Harrington* v. *Stratton*, 22 Pick. 510. 1 Greenl. Ev. §§ 284, 303, 304.

The other note and mortgage, made at the same time as the note in suit, were properly admitted, being part of the same transaction. Besides; the referees having found that there was a failure of consideration, so far as the note was security for the insolvent's liabilities for Moore; and a want of consideration, so far as it was given to secure a balance of account or of claims between the insolvent and the defendant; it is apparent that the admission of the testimony, if erroneous, did not affect the conclusion of the referees, and so the award should not be set aside. *McGuire* v. *O'Hallaran*, Hill & Denio, 85. *Roloson* v. *Carson*, 8 Maryland, 208. *Bassett* v. *Cunningham*, 9 Grat. 684. *Kemeys* v. *Richards*, 11 Barb. 312. *Ludington* v. *Taft*, 10 Barb. 447.

Dewey, J. This case is clearly distinguishable from that of *Allen* v. *Furbish*, 4 Gray, 504, it being a case where the defence is purely a failure or want of consideration. The admission of the proposed evidence is no more objectionable than would be the admission of evidence that an absolute note which was sought to be recovered by the payee was really an accommodation note, made at the request of the payee to enable him to raise money at the bank or elsewhere, but which, not having been used for that purpose, was kept in the hands of the payee.

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The proposed evidence does not tend to establish any condition or limitation to the terms of the note, but to show that there never was as between these parties any consideration for the note.

We should have had no difficulty in entering judgment for the defendant, but for the question of the competency of the particular evidence which is stated in the amendment to the award to have been admitted by the referees, and which, if erroneously admitted, does, by the terms of the award, require the same to be set aside. The fact that the defendant, on the same day and during the same interview in which the note declared on was executed, gave another note to another person, and that such person afterwards gave up that note as having been given without consideration, was in our view incompetent evidence, and ought not to have been admitted. We are precluded from considering this as merely irrelevant evidence, and therefore furnishing no sufficient ground for setting aside the award, inasmuch as the referees have given effect to it as proper for their consideration. The award having been made conditional upon the legal admissibility of this evidence, the result must be

Award set aside and case recommitted

NATHANIEL LEWIN & others *vs.* WHITTENTON MILLS.

A certificate filed in the town clerk's office, under *St.* 1855, *c.* 431, §§ 2, 3, claiming a lien for the entire amount agreed to be paid for the performance of a contract to do certain labor and furnish certain materials in the erection of a building, and stating that the mechanic has not completed the work, by reason of proceedings in insolvency against the owner of the land, and not stating the proportion due for the labor actually performed and materials actually used, is insufficient to support a lien on the building and land under that statute.

PETITION to the court of common pleas in Bristol to enforce a mechanics' lien under *St.* 1855, *c.* 431, on the respondents' factory in Taunton, under a contract set out in the statement under

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oath, filed by the petitioners in the town clerk's office on the 15th of December 1857, a copy of which was annexed to the petition. The petition alleged that since said statement was recorded the petitioners had done no work on said contract; that they had always been ready to complete it according to its terms, and had not completed it solely because they had not been informed that the owners of the property were ready to have it completed; and that they had never been informed that said owners wished it to be no further completed.

The statement averred that on the 15th of March 1857 the petitioners made a contract with the respondents, by which they "undertook to do certain millwright and carpenter work, and to furnish certain materials therefor, including therein the iron work necessary thereto in erecting, altering and repairing the factory buildings of said company;" and by which they "agreed to do the work and furnish the materials stipulated in said contract for the sum of thirty eight hundred dollars." The material part of the residue of said statement was as follows:

"And we further say that we proceeded to perform said contract, and had nearly completed the same on the seventeenth day of November A. D. 1857, when said company was by the judge of insolvency for said county adjudged to be insolvent, and a warrant was issued to the sheriff of said county by said judge, commanding him to take possession of the property of said company, and we have been since said time unable to complete said contract by reason of the proceedings aforesaid, and have ceased labor thereon from that time; and we hereby declare our readiness and desire to finish and perform said contract according to its terms, whenever we may be permitted so to do.

"And we claim a lien on the said Whittenton Mills and the land under and connected therewith, with the appurtenances of said mills and land, for the sum due us on said contract and for the completion thereof. And we state a true account of the amount due us therefor, upon which no payment has been made.

"Whittenton Mills to Lewin, Fisk & Kenyon Dr.

"Nov. 17, 1857. To amount of contract, on which the entire sum ought to be paid . . . $3,800.00."

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The respondents demurred, among other reasons, "because the certificate which is annexed to and referred to in said petition is wholly insufficient, and does not comply with the requirements of chapter 431, section 2, of the statutes of 1855; because the claim of the petitioners for the whole amount of the price stipulated in the contract referred to in said certificate annexed is wholly unauthorized in the law; and because the said certificate does not contain any account of the sum due them for labor and materials furnished by them as alleged."

The court of common pleas sustained the demurrer, and the petitioners appealed to this court, before whom the case was argued at Boston in January 1859.

B. Sanford, for the respondents.

C. W. Thrasher, for the petitioners.

METCALF, J. To entitle a person to a lien upon buildings and land under *St.* 1855, *c.* 431, he must "actually perform labor in erecting, altering or repairing" the buildings, or "furnish materials actually used for the same;" and must file in the office of the town clerk "a statement of a just and true account of the amount due him, with all just credits given;" but "no inaccuracy in the statement, in stating the amount due for labor, shall invalidate the proceedings, unless it shall appear that the person filing the certificate has wilfully and knowingly claimed more than is his due." *St.* 1855, *c.* 431, §§ 1, 2, 3.

Tried by these tests, the statement filed by these petitioners, a copy of which is annexed to their petition, is clearly insufficient. In it they claim a lien for the whole amount of the contract, while they distinctly allege that the contract has not been fully performed; and they afford no means of estimating the proportion or the value of the labor which has been "actually performed," and the materials which have been "actually used," for which alone the statute gives a lien. The excuse for non-performance, alleged in the petition and certificate, might be sufficient to entitle the petitioners to maintain an action at law or prove a claim in insolvency against the owner of the buildings for the value of such labor and materials; but it cannot justify them in claiming a lien for an entire sum, part of which

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they clearly show that they know to be not yet due. See *Mc Clallan* v. *Smith*, 11 Cush. 240.

The case of *Parker* v. *Bell*, 7 Gray, 429, is clearly distinguishable from this case. It was there held, that including in the statement a claim for materials, which it was admitted could not be supported, and a claim for the labor of the petitioners' journeymen, which had not then been adjudged to be untenable, did not show such a wilful overstatement as would defeat the petitioners' lien for their personal labor; no suggestion being made "that any of the items in the account contained in the statement filed were in any respect false, or unjustly exaggerated," and it being "conceded that the amount in the account was justly due to the petitioners." See 7 Gray, 433.

Demurrer sustained.

Sophia Tilden *vs.* Charles L. Tilden.

A devise upon condition that the devisee shall "comply with what is enjoined upon him in this will," is *prima facie* upon condition that the devisee shall also comply with what may be enjoined upon him in any codicil to the will.

A condition, in a devise, to keep a house in good repair, is broken by omitting to rebuild the house within a reasonable time, if destroyed by fire.

A testator by his will gave to his wife an honorable maintenance for life, to be provided by his son; to one daughter, so long as she should remain unmarried, the improvement of half of his dwelling-house, and certain privileges, and a certain provision at the expense of his son; the residue of his estate to his son, "provided he shall in all respects comply with what is enjoined upon him in this will, and if he shall not thus comply," then to the testator's two daughters in equal shares; and constituted his son executor. By a codicil, the testator directed his son, his heirs and assigns, to keep in good repair all that part of the dwelling-house, the improvement of which had been given to the unmarried daughter; and charged his real estate with the support of said daughter in case the provision already made for her should prove inadequate. *Held*, that the testator's son took the estate upon condition that he should keep the house in repair; that, in case of the house being burned down, a failure to rebuild within a reasonable time was a breach of the condition; and that the facts, that the daughter had leased her part of the house to the son, and that a sublessee was in possession at the time of the fire, did not affect her right to have it repaired, nor extend the time within which that should be done.

J. S. devised the use and improvement of half of his dwelling-house to a daughter for life and devised all his estate to his son upon condition that he should keep that half of the house in repair, and in case of his failure to comply with any provision of the will gave

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the estate to this daughter and another. After breach of the condition, this daughter in writing requested the son "to repair the dwelling-house, the use and improvement of which were devised by J. S. to me," and notified him that she claimed that the estate devised to him was forfeited by his failure to comply with the provisions of the will, and that she claimed her share under the devise thereof in case of such failure. *Held*, that this was sufficient demand and notice, if any were necessary, before bringing a suit to recover her half of the estate, for breach of the condition.

WRIT OF ENTRY, dated May 30th 1857, to recover land in Marshfield. Plea, nul disseisin. Trial in this court in Plymouth before *Metcalf*, J., who made a report thereof to the full court, the material parts of which were as follows:

"It was admitted by the tenant that Wales Tilden, senior, died seised of the demanded premises in the year 1850. And the demandant gave in evidence the last will of said Wales, dated January 16th 1824, and the codicil thereto, dated April 25th 1846, both proved and allowed by the probate court for this county, in November 1850; which will and codicil are to be taken as part of this report."

The will constituted the testator's son, Wales Tilden, sole executor; and contained the following provisions:

"*Imprimis.* I give and bequeath to my beloved wife, Abigail Tilden, during life, an honorable maintenance in sickness and in health, to be provided for her by my son, Wales Tilden."

Then followed a bequest of $100, and certain specific legacies, to each of the testator's two daughters, Nabby L. Rogers and the demandant; a bequest to the latter of certain domestic animals, "to be kept for her use at the expense of my son, Wales Tilden," and, in case of their death, to be replaced by him with others; a devise to her, so long as she should remain unmarried, of the easterly part of the testator's dwelling-house, with certain fuel, provisions and other privileges, to be provided for her while unmarried, at the expense of the testator's son; and a direction that upon her marriage all these privileges should cease, and she should receive in lieu thereof an additional sum of $100 from said son.

"I also give and devise to my son, Wales Tilden, all my estate, real and personal, not hereinbefore bequeathed and devised, wherever the same may be found; provided my son, Wales

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Tilden, shall in all respects comply with what is enjoined upon him in this my last will and testament; and if he shall not thus comply, I give and devise all which I have by this instrument given and devised to him, to my daughters, Nabby L. Rogers and Sophia Tilden, to be equally divided between them."

The codicil, which the testator therein expressly directed should be annexed to his will and taken as part thereof, consisted of a gift to the demandant during her life of the use and improvement of land about his dwelling-house, and certain additional privileges in the house; a direction to his said son, his heirs and assigns, to provide wood for her annually, "and to keep in good repair all that part of my said dwelling-house, the use and improvement of which I have given to her, the said Sophia, so long as she shall improve the same, or be entitled to the improvement thereof; and also provide for her suitable conveyance to meeting and elsewhere, whenever and wherever she may choose to go. And if she, the said Sophia, should be brought into circumstances, that with the provision that I have already made for her she cannot support herself, I hereby charge my real estate with her support during her natural life, or with so much as shall be necessary for her comfortable support, in addition to the foregoing provision."

"The demandant also introduced evidence that the house, which said will gave her the right to occupy, &c. was burned in October 1855, and that a new one had not been built.

"It was in evidence that after said Wales's death, namely, in the year 1850, the demandant let her part of said house to Wales Tilden, son of said testator and executor of said will, and that he let the same to the tenant; and that one Cox hired the same of the tenant, and remained in possession under him (the tenant occupying the other part of the house) until the house was burned.

"It was also in evidence that this notice, dated April 5th 1856, was on that day left at the house of said executor:

"To Mr. Wales Tilden, Marshfield: You are hereby notified and requested to repair the dwelling-house, the use and improvement of which was devised by Wales Tilden, deceased, to me

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and you are further notified that I shall claim and do claim all which said Wales Tilden, deceased, by and under his will and codicil devised and bequeathed to you, to have been forfeited by you, by your failure to comply with what is enjoined upon you under said will and codicil; and I claim my share thereof under the devise thereof to Nabby L. Rogers and me in case of such failure. Sophia Tilden.

"It was also in evidence that, on the day before the date of the demandant's writ, she, in the presence of said executor and of the tenant (who is the son of said executor) entered upon the demanded premises for breach of the condition, and took possession thereof; and the tenant then claimed title to the same.

"A verdict was taken for the demandant, by recommendation of the court and consent of parties, subject to the opinion of the whole court, who are to render judgment thereon, or direct a nonsuit, or order a new trial, as the law and justice of the case may require."

This case was argued at Boston in January 1859.

C. M. Ellis, for the demandant.

P. Simmons, for the tenant. 1. The manifest intent of the testator by his will was to provide an honorable maintenance for his widow; to give his daughter Sophia an estate in the half house for life or until marriage (with some legacies and a suitable provision for life, subject to an alteration upon marriage); and that his son should provide the maintenance of the widow and this daughter, pay the legacies and take the residue of the estate.

To construe the estate of the son as an estate upon condition subsequent would defeat the testator's intent, upon a forfeiture of the son's estate, by cutting off the provision for the widow and this daughter, except half of the estate to the latter, which might be insufficient. It is a mere condition *in terrorem*. *Parsons* v. *Winslow*, 6 Mass. 178. The will should rather be construed as giving an estate to the son, charged with trusts for the benefit of the widow and daughter.

2. The direction to repair the house is not found in the will, which contains the condition; but is found in the codicil, which

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in terms charges the estate with Sophia's support, and "this is strong, if not conclusive, proof that the testator did not intend that the devise should be defeated by" omission to repair, "but that it should stand as security only." *Taft* v. *Morse*, 4 Met. 526. *Gardner* v. *Gardner*, 3 Mason, 178, and 12 Wheat. 498. 1 Jarman on Wills, 171.

3. If the tenant took an estate upon condition, there has been no breach of condition. The will does not require him to build or provide a house, but only to repair. The demandant, being tenant for life, was herself bound to rebuild, or at least, if she did not, forfeited the house. Co. Lit. 53 *b*. The house devised, not being in existence, cannot be repaired; and performance of the condition having thus become impossible, the estate becomes absolute. 2 Bl. Com. 157. Co. Lit. 206. 1 Salk. 170.

4. The demandant has leased the house to the tenant. It does not appear that she has since entered, or has a right of entry. The tenant may rebuild before his lease expires. 3 Kent Com. (6th ed.) 467.

5. The notice was insufficient. A demand of payment is necessary before an estate can be forfeited for breach of condition, and for the precise amount due. "If the demand be of a penny more, or penny less, it will be ill." *Bradstreet* v. *Clark*, 21 Pick. 396, and cases cited. This notice requires the tenant to rebuild the whole house, when the will only required him to rebuild the demandant's half of the house.

METCALF, J. 1. The original will of the testator, after giving to this demandant pecuniary and specific legacies, devised to her the improvement of the easterly half of his dwelling-house as long as she should remain unmarried, and made his son Wales residuary devisee and legatee, provided he should in all respects comply with what was enjoined upon him in the will; and on his failure so to do, all that was so given to him was given over to the demandant and the testator's other daughter, to be equally divided between them. This devise to Wales was clearly on a condition subsequent, by a breach of which he would forfeit the property devised to him, and give to the

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two daughters a right to enter upon the real estate and hold it as their own.

After the will had stood thus during twenty two years, the testator added a codicil, the sole purpose and effect of which were to make further provisions for the demandant. By that codicil, he gave to her the use and improvement, during her life, of land about his dwelling-house, and additional privileges in the house, and directed Wales, and his heirs and assigns, to provide wood for her, and to keep in good repair that part of the house, of which the improvement was devised to her by the original will, so long as she should be entitled to the improvement of it.

The demandant has entered upon the real estate devised to Wales, claiming it as forfeited by his failure to keep her part of the dwelling-house in good repair, according to the direction in the codicil, and has brought this writ of entry against his grantee to recover an undivided moiety of it. And if the estate is forfeited, the action is rightly brought for a moiety only. For though, by the will, the forfeiture was to be to both daughters, as tenants in common, yet one tenant in common may sue alone for his particular share. Rev. Sts. *c.* 101, § 10. The action is also rightly brought against Wales's grantee, who is in possession. For if Wales had only a defeasible estate, he could convey only an estate subject to be defeated.

2. Is the estate, which was devised to Wales, subject to forfeiture by the failure to comply with what is enjoined on him by the codicil, as well as by a failure to comply with what was enjoined on him by the original will? We think it is. A codicil, duly executed, is an addition or supplement to a will, and is no revocation thereof, except in the precise degree in which it is inconsistent therewith, unless there be words of revocation. And it is an established *prima facie* rule of construction, that an additional legacy, given by a codicil, is attended with the same incidents and qualities as the original legacy. 4 Dane Ab. 550. 4 Kent Com. (6th ed.) 531. 1 Jarman on Wills, 160. 1 Roper on Leg. (2d Amer. ed.) 873–875. 2 Williams on Executors, (4th Amer. ed.) 1403 *& seq.* *Doe* v. *Latham*,

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Busbee, 365. Upon the same principle, a devise upon condition that the devisee shall "comply with what is enjoined upon him in this will" must be construed, *prima facie*, to be upon condition that the devisee shall also comply with what may be enjoined upon him by any codicil. There is nothing in the present case to control this construction. Nothing in the will is revoked by the codicil. And we cannot doubt that the testator intended that the additional provision, made for the demandant in the codicil, should have the same incidents which the original provision had, and should give to her the same rights which were by law attached to that provision.

3. Has Wales broken the condition on which we hold that the devise was made to him, by failure to keep in good repair that part of the dwelling-house, of which the improvement was given to the demandant? We think he has. If he had undertaken, by contract, to keep it in repair, there can be no doubt that he must have repaired it, after the fire, or have rendered himself liable to an action for breach of his contract. *Phillips* v. *Stevens*, 16 Mass. 238. 4 Dane Ab. 375, 376. 3 Kent Com. (6th ed.) 467. Platt on Cov. 274. And we cannot suppose that the obligation imposed on him by the codicil was of less force than his voluntary contract would have had.

4. The fact that the demandant had leased her part of the dwelling-house, and that a sublessee was in possession at the time of the fire, cannot affect her right to have it repaired, nor extend the time within which the repair should be made. The law gave a reasonable time for repairing, and such time had elapsed after the fire, and also after demand made, before this action was commenced.

5. We are of opinion that if any notice and demand were necessary, (which we need not decide,) the notice was rightly given to Wales, and the demand rightly made on him. We are also of opinion that the notice was sufficient in form, inasmuch as Wales could not have failed to understand what it meant. *Doe* v. *Culliford*, 4 D. & R. 249. *Judgment on the verdict.*

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Sarah Tilden & others *vs.* John Tilden, Executor.

Upon the offer for probate of a will, not in the handwriting of the testator, but signed by him, with the usual attestation clause added, signed by three witnesses, one witness testified that he and the second witness signed it at the same time, in the presence and at the request of the testator, without reading it or being told that it was a will, and that the testator directed him where to put his name, but did not sign it in his presence, nor say the signature was his. The second witness testified that the testator, after requesting them to sign it, signed it himself, and declared it to be his will, and then they signed it, and his impression was that the third witness was then present. The third witness testified that the other witnesses did not sign in his presence; that the testator brought the paper to him, and requested him to witness it, which he did in the testator's presence, but without reading it; that he thought the names of the other witnesses were then upon it, but could not say whether the testator's name was; and that the testator did not sign it in his presence, or say anything about his signature. *Held*, that this was sufficient evidence of the execution and attestation of the will.

Appeal by the heirs at law of Thomas Tilden, of Roxbury, from a decree of the probate court of the county of Norfolk, establishing an instrument as his last will. The questions, whether the will was duly attested by three subscribing witnesses, and whether the proof was sufficient in law to sustain the will, were submitted to the decision of the court upon an agreed statement of the facts, and of the testimony of the witnesses, the material parts of which were as follows:

The will is not in the handwriting of Thomas Tilden; but it is subscribed by him, followed by this attestation clause:

"Signed, sealed, published and delivered by the abovenamed Thomas Tilden, to be his last will and testament, in the presence of us, who at his request and in his presence have hereunto subscribed our names as witnesses to the same.

"John Hunt,
"Edwin Lemist,
"John W. Lord."

John Hunt testified: "Mr. Tilden came to my factory, and my impression is that he had a paper in his hand. He said to me, 'I wish you to go with me to witness this.' He did not call it his will. We went up to Mr. Lemist's store. After we had entered, he opened a paper, laid it down on Lemist's desk,

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and said, 'Put your name there' — directing me. I did so, and Lemist put his on, and we came off. I did not read a scrap of the paper. I did not see his signature at all. He did not sign it in my presence, nor call my attention to it, as being his signature. My recollection is positive, and I have no doubt the facts are just as I have stated. No other persons were present. Some years subsequent I witnessed a will, and then I saw another form of witnessing, which I thought if important in one case, was in the other. I then told the old gentleman of the circumstance, saying to him that I did not think his will was legally witnessed. My reason for doing this was because I did not see his signature. He made no answer. I had known Mr. Tilden ever since I was a schoolboy, for fifty years."

Edwin Lemist testified: "The late Thomas Tilden came to my store in Roxbury in company with Mr. Hunt. They came directly to the back part of my store, where my desk stood. Mr. Tilden took from his pocket a folded paper and laid it upon the desk, and when he had adjusted his spectacles, he said, 'Gentlemen, I wish you to witness my signature to my will.' I took from the stand a steel pen and handed it to him, with which he signed his name to said paper, in the presence of Mr. Hunt and myself. Mr. Hunt signed his name as a witness, and I did the same, in the presence of Mr. Tilden. The paper was not read in our hearing, nor did we read it that I know of. I had upon my desk an inkstand, and in it usually kept three steel pens. Mr. Tilden used the same ink, I have no doubt, but think he may not have used the same pen that Mr. Hunt and myself did. Mr. Tilden thanked us for witnessing the will, bade us good morning, and left. The impression is very strong on my mind that Mr. Lord was present when the will was signed."

John W. Lord testified: "The will was signed by me, in my counting room, in Roxbury. Mr. Tilden came in with the paper, and said, 'I wish you to witness this.' No one came with him, and no one else was present. I think the names of the other witnesses were on at the time. I cannot say whether Mr. Tilden's name was on or not when I signed my name. He did not sign his name in my presence. He did not say any-

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thing about his signature, or make any allusion to it. When I signed, he was in the doorway. After the paper was signed, he took it away. I think Mr. Tilden's position was such that he could see me sign my name. I have no recollection of reading any part of the paper. I was not present when Mr. Hunt and Mr. Lemist signed their names."

Peter Butler, a competent expert, testified that, in his opinion, the signature of Mr. Tilden to the will was made with other ink than that used by Messrs. Hunt and Lemist.

This case was argued at Boston in January 1859.

W. S. Leland, for the appellants. There were no acts or words equivalent to a signing by the testator in the presence of three witnesses, as required by the Rev. Sts. *c.* 62, § 6. There must be a perfect execution in the presence of each witness. Only one of the witnesses testifies that the testator signed in his presence; the two others testify positively that he did not; and as the will was not in the testator's handwriting, and all the witnesses testify that they did not read the attestation clause, there is no room for presumption in favor of the will. To establish the will, under these circumstances, would be to take a step beyond any adjudged case, and entirely disregard the statute of frauds. *Rutherford* v. *Rutherford*, 1 Denio, 33. *Lewis* v. *Lewis*, 1 Kernan, 220. *Rogers* v. *Diamond*, 13 Ark. 474. *Boldry* v. *Parris*, 2 Cush. 438. *Hall* v. *Hall*, 17 Pick. 379. *Dewey* v. *Dewey*, 1 Met. 349. *Hogan* v. *Grosvenor*, 10 Met. 54. *Osborn* v. *Cook*, 11 Cush. 532. *White* v. *British Museum*, 6 Bing. 310. *Wright* v. *Wright*, 7 Bing. 457. *Hudson* v. *Parker*, 3 Notes of Cases, 236. *Beach* v. *Clarke*, 7 Notes of Cases, 120. *Ilott* v. *Genge*, 3 Curt. Eccl. 181. 1 Jarman on Wills, 72.

J. J. Clarke, for the appellee.

Dewey, J. The testimony of Edwin Lemist, if believed, establishes the fact that this instrument was executed by the testator, in the presence of himself and John Hunt as witnesses, under accompanying circumstances that present a case as to the two witnesses that would not have been questioned even before the late cases of *Hogan* v. *Grosvenor*, 10 Met. 54, and *Osborn* v. *Cook*, 11 Cush. 532. It is true that Hunt does not recollect all

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the facts stated by Lemist, and now declares that the testator did not actually sign it in his presence, and did not call it his will. But Hunt says that the testator asked him to witness the instrument, produced the instrument, laid it on Lemist's table, and said, "Put your name there," directing him as to the place. Upon looking at the will and the place where he was directed to sign, it will be seen to have had the full attestation clause, "signed, sealed, published and delivered, by the abovenamed Thomas Tilden, to be his last will and testament, in the presence of us, who at his request and in his presence have hereunto subscribed our names as witnesses to the same." The testimony of Lemist, being positive in its character, is rather to be taken than the negative testimony of Hunt as to the testator's not signing it in his presence, nor declaring it to be his will; as the omission of Hunt to state this fact might result from mere failure of memory.

The only difficulty in the case arises upon the fact of a proper attestation by the third witness, John W. Lord. In reference to this witness, it is said that there was no publication of the will by the testator, no actual signing in his presence, no direct acknowledgment that he had signed the paper, and no knowledge on the part of the witness whether the testator's signature was on the paper at that time. But we have the fact that the testator came to the counting room of Lord with the paper in his hand, and said to the witness, "I want you to witness this." We have the further facts that he had previously signed the paper, and that the names of the other witnesses were already on the same, written under the attestation clause already quoted. Lord says he thinks the names of the witnesses were there. He must, of course, have seen them there, and the attestation clause was before him and to it he attached his signature. The testator came there from Lemist's store, where he had just said to the other witnesses, "Witness my signature to my will." He was the sole agent in procuring the attestation of the witnesses. He was the keeper of the instrument. It had already been signed by him, and all the circumstances tend to show, beyond any doubt, that he was fully

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cognizant of the nature and purposes of the instrument. It is true that the will was not in his handwriting; and therein the case differs from *Hogan* v. *Grosvenor* and *Osborn* v. *Cook*, above cited. But in the absence of this fact we have the other circumstances already alluded to, of the undoubted knowledge of the testator of the character of this paper, and we have the ancient form of an attesting clause, declaring it to be his last will and testament. So far as the fact is material that the testator was fully cognizant that this paper was his last will and testament, the evidence is quite sufficient to find this fact from. It was not necessary that the witness Lord should know the character of the instrument. It was enough that the testator had actually signed it, knowing it to be his last will and testament, and designing to have it duly executed as such, had so declared it, as testified by Lemist, and had called upon Lord to attest his execution of an instrument, whose character he well knew, by the request, "I wish you to witness this," and that thereupon the witness signed this attesting clause.

This subject has been much considered, and the authorities cited, in the cases already referred to, and in *Dewey* v. *Dewey*, 1 Met. 349, and *Nickerson* v. *Buck*, 12 Cush. 339, and it is only necessary here to refer to those cases. In the opinion of the court, the evidence was sufficient to authorize finding this instrument to have been duly signed by the testator, and duly attested as his last will and testament.

Decree of the court of probate affirmed.

IVORY HARMON & another *vs.* MOSES CLARK & another.
MOSES CLARK & another *vs.* IVORY HARMON & another.

The assignee of the estates of both partners under distinct proceedings in insolvency must administer the estate of the partnership.

Partnership property, conveyed, upon a dissolution of the partnership, to one of the partners, who agrees to hold and convey one half of it to his copartner after paying the debts of the firm, is to be applied, in case of the insolvency of both partners, to the payment of the partnership debts.

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Harmon & another v. Clark & another.

Partnership property, mortgaged by the partners to secure a joint and several note signed by them individually for money which was applied to the separate use of one partner, was appropriated by the assignees of the partnership to the payment of that note. *Held*, that the estate of the partnership was not entitled, in insolvency, to any contribution from the estate of that partner.

PETITIONS to this court in the exercise of its chancery jurisdiction in insolvency. Hearing at February term 1858 in Norfolk, before *Merrick*, J., who reported to the full court the following case:

Horace King and Jacob B. Flagg on the 23d of May 1856 were, and for a considerable period previous to that time had been copartners in business under the name and firm of J. B. Flagg & Company, for the purpose of maintaining and running a line of omnibus coaches to and from the cities of Boston and Roxbury; and were then, and had before been owners, in their copartnership capacity, of many coaches, horses and other personal property used in their said business; and they were then, and for a considerable period of time previously had been indebted, in their said copartnership capacity, to many persons in various sums of money.

On the 23d of May 1856 King and Flagg dissolved their said copartnership by mutual consent; and thereupon all the copartnership property of every description was transferred by Flagg to King; and King, in consideration of said conveyance, did promise and agree with Flagg, that if the property so conveyed should be insufficient to pay and discharge all said debts of the partnership and the incumbrances on the property, he would indemnify and save the said Flagg harmless therefrom; and King thereupon made, signed and delivered to Flagg this agreement:

"Yarmouth, Maine, May 23d 1856. This is to certify that I, Horace King of Roxbury, State of Massachusetts, do agree to hold and convey to Jacob B. Flagg of Roxbury one undivided half of the stage or omnibus line now running between Roxbury and Boston, when the line is clear from the incumbrances now upon the said line, and the debts it is now owing.

"Horace King."

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At the time of the conveyance of Flagg to King, all the property belonging to the firm of J. B. Flagg & Company was subject to two mortgages, each executed by King and Flagg in their individual capacities, to secure the payment of their joint and several note of the same date, the first to the Rockland Bank for the sum of $20,000, and the other to Thomas Adams, for the sum of $10,000, for moneys, in each case, lent to King and Flagg in their individual capacities; and for which no note or security was given by or in the name of J. B. Flagg & Company. By agreement of the partners between themselves, the whole of the money so borrowed of Adams, and $12,000 of the money borrowed of the Rockland Bank, was taken and appropriated by King to his own sole and private use, and the remaining sum of $8,000 was taken by the firm of J. B. Flagg & Company and appropriated to partnership purposes.

On the 13th of June 1856 King applied to a commissioner of insolvency, describing himself as "omnibus proprietor, late copartner with Jacob B. Flagg," representing "that he is jointly and severally indebted, in divers sums of money, amounting, in the whole, to not less than two hundred dollars, which he is unable to pay in full, and he wishes to surrender all his joint and several property, for the benefit of his joint and several creditors, and to obtain a discharge from his said debts, according to the statutes in this behalf provided;" and praying "that a warrant may be issued for taking possession of his joint and several estate;" and a warrant was issued thereon to take possession of all his estate, returnable on the 18th of July, when Clark and Adams were chosen his assignees, and his estate assigned to them.

On the 2d of July 1856 Flagg applied to said commissioner, describing himself as "omnibus proprietor, late partner with Horace King;" representing "that he is indebted in divers sums of money, amounting in the whole to not less than two hundred dollars, which he is unable to pay in full, and he wishes to surrender all his individual and partnership property, for the benefit of his individual and partnership creditors, and to obtain a discharge from his said debts, according to the statutes in this

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behalf provided;" and praying "that a warrant may be issued for taking possession of his individual and partnership estate;" and a warrant was thereupon issued to take possession of all his estate. At the first meeting in Flagg's case, on the 17th of July, fifteen creditors proved debts against the partnership estate, and one creditor against Flagg's private estate. The creditors who had thus proved then chose Clark and Adams assignees of the joint and separate estate, by their indiscriminate votes.

Clark and Adams accepted each trust, and took possession of the property of the partnership, and administered and accounted for it as the property of J. B. Flagg & Company, and applied $30,000 thereof to the extinguishment of the mortgages to the Rockland Bank and Adams; and moved the commissioner for leave to repay from the separate estate of King to the joint estate of J. B. Flagg & Company $22,000, being the amount of the mortgage to Adams, and of so much of the money borrowed of the Rockland Bank as was applied to the private use of King. The commissioner granted the motion as to the $10,000 paid to Adams, and disallowed it as to the $12,000 part of the sum paid to the Rockland Bank.

Ivory Harmon and Henry M. Harmon, private creditors of King, petitioned this court to reverse the first part of the order of the commissioner, and to direct that the whole of the property conveyed by the partnership to King should be appropriated to the payment of King's private debts; and the assignees petitioned this court to reverse the last part of the order of the commissioner.

These cases were argued in Norfolk at November term 1858.

W. Gaston & J. W. May, for the creditors of King. Before the filing of either petition in insolvency, the partnership had been dissolved, and the partnership property conveyed to King; and neither partner, in petitioning for the benefit of the insolvent laws, represented the firm as in existence or insolvent, or prayed that its property be taken. In Flagg's case, the assignees were elected by the indiscriminate vote of private creditors and creditors of the late firm; whereas, if the firm was in insolvency, only copartnership creditors could have legally voted. *St.* 1838, *c.* 163, § 21.

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1. No firm, therefore, is in insolvency by the proceedings in these cases, nor are Adams and Clark assignees of the estate of J. B. Flagg & Company. *Parker* v. *Phillips*, 2 Cush. 175. *Dearborn* v. *Keith*, 5 Cush. 225. *Thompson* v. *Thompson*, 4 Cush. 133. *Hanson* v. *Paige*, 3 Gray, 239.

2. By the dissolution and conveyance, the property, formerly belonging to the firm of J. B. Flagg & Company, became the private property of King. *Howe* v. *Lawrence*, 9 Cush. 553. *Barclay* v. *Phelps*, 4 Met. 397. *Reese* v. *Bradford*, 13 Alab. 837. Collyer on Part. §§ 894, 995.

3. If the property did not so become absolutely the private property of King, the most that can be claimed for the partnership creditors is that it remained the unappropriated property of the late firm. But in that case the partnership property must go to the partnership creditors, and the private property to the private creditors. *St.* 1838, *c.* 163, § 21. The attempt to obtain repayment to the partnership estate of the amount of $22,000 paid to extinguish the mortgage thereon is, in effect, an attempt to prove against one partner's estate a debt due to the partnership — which is not to be allowed. *Somerset Potters' Works* v. *Minot*, 10 Cush. 597. Gow on Part. 358. Collyer on Part. § 1003.

G. T. Curtis, for the assignees. 1. The partnership property must be administered, and the rights of the partnership creditors in this controversy enforced, through Clark and Adams, chosen assignees of both partners.

2. The partnership property did not become the separate property of King, before the insolvency proceedings. The *bona fides* requisite to convert partnership property into separate property, on a dissolution and a sale of the interest of a retiring partner to the remaining partners, is not confined to the intention of the retiring partner, but embraces the intention of all the partners in respect to the rights of creditors of the partnership. Collyer on Part. §§ 174, 894, 903. Story on Part. § 358. *Ex parte Ruffin*, 6 Ves. 127. *Ex parte Fell*, 10 Ves. 347. *Ex parte Williams*, 11 Ves. 3. *Ex parte Rowlandson*, 1 Rose, 416. *Campbell* v. *Mullett*, 2 Swanst. 575. *Allen* v. *Center Valley Co.* 21 Conn. 130. *Ferson* v. *Monroe*, 1 Foster, 462. *Howe* v. *Lawrence*,

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9 Cush. 553. When Flagg conveyed his interest to King, by the agreement of the parties, the partnership property was impressed with an express trust that it should be applied *in specie* to the payment of the incumbrances and the partnership debts. The right of a retiring partner to subject the partnership property to his lien for the payment of the partnership debts is unquestionable; and that lien, when left upon the property by the terms of the dissolution, prevents its conversion into separate estate. 11 Ves., 21 Conn. and 9 Cush., above cited.

3. The claim of the joint creditors to relief against the separate estate of King, on account of the diminution of the joint estate to the amount of $22,000, occurring after the insolvency, by reason of the operation of the mortgages held by the Rockland Bank and Thomas Adams, given by King & Flagg upon the partnership property, to secure the payment of money borrowed in their joint and several individual names for the separate use of King in a separate trade, is not within the decision in *Somerset Potters' Works* v. *Minot*, 10 Cush. 592. That was an attempt to prove in insolvency against the separate estate of one partner a debt due from him to the partnership, on account of advances to him in a separate trade. In the present case, a mortgage creditor, after the insolvency, having the right to resort to two funds, by resorting to the partnership estate, and taking his whole debt, diminishes the joint fund, and exonerates the separate fund.

The remedy for the partnership creditors is: (1.) By substitution to the same rights against the separate estate which the mortgage creditor had, by a decree in equity for restitution *pro tanto*. 1 Story on Eq. §§ 499, 561–567. Cox's note to *Clifton* v *Burt*, 1 P. W. 678. *Westfaling* v. *Westfaling*, 3 Atk. 467. *Davies* v. *Topp*, 1 Bro. C. C. 526. *Aldrich* v. *Cooper*, 8 Ves. 388. *Wilson* v. *Fielding*, 2 Vern. 763. *Selby* v. *Selby*, 4 Russ. 336. *Hodgson* v. *Shaw*, 3 Myl. & K. 190. *Cheesbrough* v. *Millard*, 1 Johns. Ch. 409. Or, (2.) By a decree for contribution, upon the equity that the joint estate has sustained the whole of a burden, part of which only it belonged in truth to the joint estate to sustain. *Rogers* v. *Mackenzie*, 4 Ves. 752. *Ex parte*

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Plowden, 2 Dea. 456, and 3 Mont. & Ayrt. 402. *Ex parte Willock*, 2 Rose, 392. *Ex parte Reid*, 2 Rose, 84. *Ex parte Rutherford*, 1 Rose, 201. There is nothing in our insolvent statutes to prevent the application of this doctrine of equity; and it may often be necessary, in cases of partnership and separate estates, for this court to exercise its equity powers in decreeing contribution from the one to the other, in order to ascertain the "net proceeds" of each, which the statute directs to be distributed to its appropriate class of creditors. *St.* 1838, *c.* 163, § 21.

Bigelow, J. 1. It can make no essential difference in these cases, that the copartnership was not declared insolvent. Each of the copartners had declared himself insolvent, and had surrendered his joint and separate property for the benefit of his joint and several creditors. The assignees of both estates are the same persons, and must make up separate accounts with the estate of each copartner. In doing so, in order to ascertain whether there will be a surplus of the joint estate, to be divided between the two separate estates, and the amount of such surplus, it is necessary that the assets should be marshalled, and a proper application made of the joint and separate property.

2. The facts proved do not show an absolute conversion of the partnership property into the separate estate of King at the time of the dissolution of the firm. It is true that the legal title was vested in him; but he did not take it to be dealt with as his own, irrespectively of the right of his copartner to have it applied in payment of the debts of the firm, or of the claims of the joint creditors to insist, in case of insolvency, that the equities between the partners should be worked out for their benefit by its appropriation in payment of their debts. The conveyance was accompanied by an agreement on the part of King, which bound him to hold the property for the purpose of paying the debts of the firm, and, after their payment, to convey one undivided half thereof to his retiring copartner. The effect of this agreement was to fix a trust on the property in the hands of King for the benefit of his copartner. He could not fulfil his agreement to convey one half of the property to Flagg after the debts of the firm were paid, without first appropriating it fairly and fully

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to the payment of these debts. This created a clear equity in favor of the retiring copartner. He did not assign all his interest in the property of the firm, leaving no duty on the property, and taking only the personal agreement of his copartner to pay the debts of the firm. The transfer did not convert the property into separate estate, so as to place it beyond the reach of the equity which belongs to a retiring copartner to have it appropriated toward the payment of the debts of the firm. But this equity, in the nature of a lien on the joint property, was saved by the agreement under which the property was held by King.

This therefore is not a case where the right and interest of one copartner in the partnership property have been sold absolutely and in good faith to the other copartner, in consideration of a personal agreement by the latter to assume and pay the debts of the firm; and where no right or interest in the joint property, or in its appropriation to the payment of the debts of the firm, is retained by the retiring copartner. Such a transfer would be a conversion of the joint estate of the firm into the separate estate of one of the copartners, with all the incidents which follow on such conversion in case of insolvency. *Howe* v. *Lawrence*, 9 Cush. 553. But this is a case where a trust is fastened on the joint estate in the hands of the copartner in whom the legal title and possession is vested. The right to enforce the trust thus created in favor of the retiring partner devolves, in case of insolvency, on the joint creditors, who can insist that the equitable claim of one partner on the joint estate as against the other shall be worked out and administered in their favor by a proper application of the joint estate in the hands of one partner to the payment of the debts of the firm. Story on Part. §§ 97, 326, 360. *Ex parte Ruffin*, 6 Ves. 126. *Ex parte Fell*, 10 Ves 347. *Ex parte Williams*, 11 Ves. 7. *Allen* v. *Center Valley Co.* 21 Conn. 130.

Upon this ground we are of opinion that the claim of the separate creditors of King, that the partnership property conveyed to him by his copartner on the dissolution of the firm should be treated as his private estate and distributed among his separate creditors, cannot be supported; and that the assignees.

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in stating their accounts, are bound to carry the amount received by them for the sale of the partnership property to the credit of the joint estate.

3. The other question raised in these cases is, whether the joint creditors can have any relief against the private estate of King, by reason of the diminution of the joint estate, occasioned by the payment by the assignees of two mortgages on the partnership property. It appears that these mortgages were made by Flagg and King prior to their insolvency, in their individual names, and not as copartners, to secure joint and several notes signed by them individually; and that the larger part of the money obtained by these notes and mortgages was used by King for his own private use in a separate trade. The legal effect of these transactions was to transfer partnership property to secure the separate and individual debts of the two copartners. Although the mortgages were not made or executed in the name of the firm, yet being signed by both the copartners, the entire title to the property passed by the conveyance; and thereby in fact the partnership property was lawfully pledged before insolvency to secure the payment of debts which were not the debts of the firm; for the notes, being signed by the members of the firm individually, were not partnership debts. *Ex parte Weston*, 12 Met. 1. In this state of things, when both the debtors became insolvent, the creditors who held these notes and mortgages had their election, either to prove their entire debts against the private estates of both copartners, and relinquish their security under the mortgages; or to apply the partnership property included in the mortgages to the payment of the debts thereby secured, and prove for the balance. In either case, they could prove against the private estates only. They in fact elected to resort to the security alone, and not to prove their debts at all. It is clear therefore that nothing has been paid by the assignees on these claims as debts proved against the joint estate. And if any such payment had been made, it would give no right to the assignees to prove the claim against the separate estate of King. *Somerset Potters' Works* v. *Minot*, 10 Cush. 592

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The real ground of the claim made by the assignees in behalf of the joint estate is, that the property of the partnership has been appropriated to pay the private debts of one of the firm, and that thereby an equitable claim exists in favor of the joint estate, to be reimbursed for such payment out of the separate estate of the copartner whose debt has thus been paid. But this appropriation of the partnership estate was not made by the assignees, nor was it the result of the operation of any provision of the insolvent laws. It was the legitimate consequence of carrying out a valid act of the insolvents, which they had done prior to their insolvency, when they had entire control over the partnership property, with power to convert it into separate property, or appropriate it to the payment of their several and separate debts. The creditors of the firm, during the continuance of the partnership and before its insolvency, had no equity against the property of the firm. They could not interfere in any way with its disposition, nor enforce any claim against it except by a common action at law. All that they can do, in case of insolvency, is to avail themselves of any equity which may exist in favor of one partner against another in relation to the disposition of the joint estate. But no such equity exists in this case between the copartners as to the property included in these mortgages. They had both parted with all their interest to it so far as it was necessary to secure the debts for which it was pledged. To that extent, neither of the partners has any control over the property, nor as between themselves any equitable claim or lien upon it. It is clear therefore that this case falls within the reason and principle of that class of decisions in which it has been held that property, transferred by copartners *bona fide* before insolvency, cannot be reclaimed for the benefit of the joint estate. *Howe* v. *Lawrence* 9 Cush. 553, and cases cited. *Decree accordingly.*

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Robert S. McCluer *vs.* Manchester and Lawrence Railroad.

Parol evidence that a railroad corporation established by law in another state has held itself out, through its agents, as a common carrier over a railroad in this commonwealth, is sufficient *prima facie* evidence of its capacity to contract for such carriage, to maintain an action against it for the loss of merchandise entrusted to it.

A railroad corporation which has leased a portion of another railroad connecting with its own is not exempted from liability to the owner of goods delivered to it at a depot on the portion so leased, by an agreement with the proprietors of that road, by which the two corporations upon their respective roads mutually agree to furnish suitable depot accommodations, and receive and deliver freights, and that the liability of the first corporation for upward freight upon the road of the second shall not commence until delivery on the cars of the first.

A railroad corporation cannot dispute their liability for freight delivered to them to be carried over a railroad leased to them, on the ground that the lease is void.

Action of contract against a corporation created by the laws of New Hampshire, as common carriers of goods between Lawrence in this commonwealth and Manchester in the State of New Hampshire, to recover the value of sundry boxes of tallow delivered by the plaintiff to them at Lawrence to be carried to said Manchester and thence to be forwarded to Rumney, N. H., and destroyed by fire by reason of the defendants' want of care on the 15th of December 1854. The answer denied the plaintiff's loss, the defendants' negligence, and their liability to the plaintiff; and averred that the Boston and Maine Railroad were responsible for the plaintiff's loss, if any; and that the defendants were liable, if at all, as warehousemen only.

At the trial in the court of common pleas in Essex, before *Mellen*, C. J., the plaintiff introduced oral testimony of these facts: The Methuen Branch Railroad, owned by the Boston and Maine Railroad, and leased to the defendants with the privilege of running their cars into the depot at Lawrence, extends northwardly from Haverhill Street in Lawrence to the line between New Hampshire and Massachusetts, and there joins the track of the defendants, which extends thence to Manchester, N. H

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The freight agent and receiving clerk at Lawrence were employed and paid by the Boston and Maine Railroad, and by their instructions acted also as the agents of the defendants, and as such accounted directly to them. The defendants had no other agents there, and paid the Boston and Maine Railroad a certain percentage per ton as a compensation for loading and unloading the defendants' merchandise for them at the freight depot in Lawrence. The defendants, and not the Boston and Maine Railroad, controlled and managed the business of transporting merchandise between Lawrence and Manchester and the north. The plaintiff's agent left the tallow, securely packed and properly directed to the plaintiff at Rumney, with the receiving clerk in the freight depot at Lawrence, which stands on the line of the Methuen Branch Railroad, south of Haverhill Street; and it was never forwarded by the defendants, but was consumed by fire, while in the depot.

The plaintiff's agent testified that he had for several years been in the habit of sending merchandise over the defendants' road to Rumney and other places north of Lawrence, and had received goods which had been sent from the north, at the same depot, and paid the defendants for the carriage thereof. To the admission of this last testimony the defendants excepted, upon the ground that a corporation can only do such acts as its charter authorizes, and that parol evidence of the usual course of business of a foreign corporation was inadmissible until its authority had been proved by the production of its charter.

The defendants were allowed, against the plaintiff's objection, to give in evidence a lease at will, executed in October 1849, by which, among other things, the Boston and Maine Railroad agreed "to grant to the Manchester and Lawrence Railroad the use of that part of their road extending northerly from their northern depot in Lawrence, wherever the same may be, to the state line, and also to furnish them with sufficient accommodations at their passenger depot; and also to allow them to use the side tracks that may be necessary for the distribution of freight in Lawrence;" and the Manchester and Lawrence Railroad agreed "to keep that part of the Boston and Maine Rail

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road, extending from their depot in Lawrence to the state line above mentioned, in repair," and to pay to the Boston and Maine Railroad, for the use of the same, such a proportion of the net earnings of the whole road from Manchester to Lawrence "as the part of the Boston and Maine Railroad above mentioned bears to the whole road from Manchester to the depot in Lawrence:" Also an indenture dated March 1st 1851, by which the Concord Railroad, including the Manchester and Lawrence and Methuen Branch Railroads, of the first part, and the Boston and Maine Railroad of the second part, mutually agree that "each party is authorized to undertake and agree for both, and will so undertake and agree, for the transaction of any joint business of the companies, meaning by joint business any business jointly participated in by them, originating upon one and terminating upon the road or roads of the other of the respective parties, subject to modifications hereinafter set forth;" that "each party, upon its respective road or roads, will furnish for the joint business necessary and suitable station and depot accommodations, furnish and sell tickets to passengers, and will with suitable and proper care receive and deliver all freight offered for transportation, including the loading and unloading necessary therefor;" it being "understood, in regard to said first party's liability for the safe care and custody of joint freight while upon the road of the second party, that such liability shall not commence upon upward freight until it is delivered on board the cars of the first party;" and "that the Methuen Branch Railroad, which is the property of the party of the second part, shall be leased, with all its rights, properties and fixtures to the party of the first part, for and during the term of five years from the first day of November last, with the right to use the passenger tracks from thence into the new passenger depot in North Lawrence, and the use of the depot for the reception and delivery of passengers and baggage, and such other depot accommodations as may be necessary for the business of said road; and said party of the second part covenants to keep said track and depot accommodations in good and sufficient order and repair, south of the centre of Haverhill Street"

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The defendants contended that the lease and indenture showed that the tallow, while in the depot, was in the custody of the Boston and Maine Railroad; that they, instead of the defendants, were responsible for it; that the freight agent and his assistants were acting for them, and not as agents for the defendants, and that the tallow had not passed into the custody and under the control of the defendants; and they requested the court so to instruct the jury. But the court declined so to do; and did instruct them that if they believed the defendants held themselves out as common carriers from Lawrence to Manchester, and by their agents received the tallow for the purpose of transporting it according to its direction, then the defendants would be liable if it was lost as alleged.

The defendants further requested the court to instruct the jury "that the defendants being a foreign corporation, and not authorized by the laws of this commonwealth to act in their corporate capacity, and not being authorized to lease the Methuen Branch Railroad, said lease was void; that the Methuen Branch Railroad had no right to transfer its privileges and duties to others without the sanction of the legislature, and that therefore the defendants were not liable as common carriers over the Methuen Branch Railroad." But the court declined to give such instructions.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions, which were argued in writing.

R. Cross & N. G. White, for the defendants.

B. F. Watson, for the plaintiff.

Hoar, J. The plaintiff seeks to charge the defendants as common carriers of goods to be transported from Lawrence to Manchester; and no question is made as to their liability in this action, if a valid contract with them in that capacity is established upon evidence not open to exception.

The parol evidence was certainly sufficient to show tnat the defendants were engaged in the business of common carriers of merchandise between those places, and that the plaintiff delivered the tallow to agents employed by the defendants for the purpose of receiving it for transportation. It is no sufficient

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answer to this proof, to suggest that the defendants were not authorized by their charter in New Hampshire to make such a contract, or to appoint agents for such a purpose. If a corporation, created by the laws of another state, whose existence and legal organization are not disputed, is found making contracts within this state through agents which it employs, and a suit is brought in such a manner that the corporation is made amenable to the jurisdiction of our courts, in our opinion it is not necessary for the plaintiff, who seeks to enforce the contract, to furnish in the outset any other evidence of the capacity of the corporation to make the contract.

Nor do the lease and agreement between the defendants and the Boston and Maine Railroad render the evidence inadmissible, or in any degree control its effect. If the tallow was delivered to agents of the defendants, and received by them on behalf of the defendants for transportation, it is difficult to see how the responsibilities of the defendants to the plaintiff upon that contract could be varied by any private arrangement between the defendants and a third party. But, upon a full examination of that lease and agreement, they do not seem to be inconsistent with the plaintiff's claim. By their terms, the business between Lawrence and Manchester is to be done by the Manchester and Lawrence Railroad; and though the Boston and Maine Railroad agree to furnish depot accommodations at Lawrence, and to receive freight, it is for and on behalf of the defendants.

The decision of this court in the recent case of *Langley* v. *Boston & Maine Railroad*, 10 Gray, , rests upon grounds wholly distinct from those upon which this action is based. The court there decided that the Boston and Maine Railroad, being the owners of the Methuen Branch Railroad, and authorized to run cars over it as common carriers of passengers and freight, could not, without the authority of the legislature, lease that road to a corporation created by another state, and transfer their powers and duties to such corporation, so as to discharge themselves from liability for injuries to persons or property which might arise in the use of the road.

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But if the plaintiff in the present action might have had a remedy, at his election, against the Boston and Maine Railroad, he is not therefore precluded from seeking it against the party with whom he directly contracted. The defendants, so far as any evidence showed, were competent to hire and use the Methuen Branch Railroad, if they could find any party that would permit them to use it and put them in possession. They were in the actual possession and use of it, without obstruction from the Boston and Maine Railroad or the Commonwealth; and they received the plaintiff's property through their agents, and agreed that it should be safely kept, and transported to its destination. It is no answer to a breach of that agreement, to deny the validity of their own contract for the use of the road. An innkeeper might as well resist the claim of a guest for compensation for the loss of his luggage, by suggesting doubts as to the validity of his landlord's title to the inn which he hired.

Exceptions overruled.

HERMON D. ROGERS & another *vs.* WILLIAM CURRIER & others.

No lien can be claimed under *St.* 1855, *c.* 231, for materials used in the construction of a ship, unless specifically furnished to be used in that ship.

PETITION under *St.* 1855, *c.* 231, to enforce a lien "for labor and materials furnished in the construction of three ships" described in the petition. The respondents were Currier & Townsend, and their assignees in insolvency.

The parties referred the case to arbitrators, who made a report to the court of common pleas, so much of which as is material to the understanding of the point decided was as follows:

Currier & Townsend, from 1840 till the 9th of April 1856, when they failed, were largely engaged in shipbuilding at Newburyport, and built in all twenty one ships. The dealings

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between the petitioners, as copartners, and Currier & Townsend, embraced in the bill of particulars in this case, commenced on the 1st of April 1852, and continued to the time of the failure; and were carried on according to an arrangement made by Rogers with Currier & Townsend in December 1850, which was, in substance, that Rogers should go into the country and purchase lots of standing timber suitable for shipbuilding, and sell the same standing to Currier & Townsend for such price as should be agreed upon for each lot, and cause it to be cut and transported to Newburyport, and should be paid, in addition to the price of the standing timber, the expense of such cutting and transportation. Two of the ships mentioned in the petition were being built by Currier & Townsend at the time of their failure, and were finished by their assignees in insolvency. The petitioners generally knew what ships Currier & Townsend were building, and were often urged by them to hasten the delivery of timber at the yard, because it was immediately wanted for ships then in progress. This was the case in reference to both of these ships. But there was never any agreement that any of the timber should be appropriated in any particular manner. Currier & Townsend sold two hundred and sixty six tons of the timber furnished by the petitioners, and used the rest in shipbuilding, except one hundred and seventy five tons left at their failure, which was afterwards sold by the assignees to Townsend, and by him used in building the third ship under a contract made by him after the failure. No account was kept of the timber which went into any particular ship, and the arbitrators have been obliged to rely upon general estimates in determining what amount of the timber furnished by the petitioners went into each of the two first ships.

The arbitrators reported the amount due to the petitioners for timber used in the construction of each of the three ships, and submitted to the court the question whether the petitioners were entitled to a lien upon either or all of the ships. The court of common pleas entered a decree for the petitioners, and the respondents alleged exceptions, and also appealed.

This case was argued at Boston in January 1859.

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O. P. Lord & W. C. Endicott, for the petitioners. By the *St.* of 1855, *c.* 231, § 1, "whenever, by virtue of any contract, expressed or implied, with the owners of any ship, money shall be due to any person for labor performed, materials used, or labor and materials furnished, in the construction of any ship in this commonwealth, such person shall have a lien upon such ship, to secure the payment of such debt." Under this statute, a petitioner, on proving a contract by which money is due to him, for materials and labor used in a ship, has a lien on the ship. It is not necessary, to carry a lien under this statute, that the contract should be specific in its application to a particular ship.

This is not like the case of liens of material men in admiralty, which are based upon and shaped by maritime usage; whereas this is a lien given in the clearest terms by statute. *The Calisto*, Daveis, 31. *Purinton* v. *Hull of a New Ship*, 2 Curt. C. C. 419–421. The words of the statute are to be strictly followed in this court, although not always followed in the admiralty; as in the case of the question whether a petition can be filed before sixty days, which was decided in the negative by this court, and in the affirmative by the district court of the United States. *Tyler* v. *Currier*, 10 Gray, . *The Richard Busteed*, 21 Law Reporter, 609. If the admiralty rule were to be followed, a lien could only spring from an express contract; but the statute says that it may from an implied contract.

Under a contract, express or implied, to furnish materials to be used in the construction of several ships, the party furnishing them has a lien on each ship for the amount used on each. *The Kiersage*, 2 Curt. C. C. 425. *Wilson* v. *Forder*, 30 Penn. State R. 129. *Butler* v. *Rivers*, 4 R. I. 38. *People's Ferry* v. *Beers*, 20 How. 394.

B. R. Curtis & C. T. Russell, for the respondents, cited *Read* v. *Hull of a New Brig*, 1 Story R. 244, 249, 250; *Sewall* v. *Hull of a New Ship*, Ware, (2d ed.) 565–568; *The Kiersage*, 2 Curt. C. C. 421, 424; *The Young Mechanic*, 2 Curt. C. C. 404, 410, 413; *The Young Sam*, 20 Law Reporter, 608; *People's Ferry* v. *Beers*, 20 How. 401; *Thomas* v. *Osborn*, 19 How. 22; *Pratt* v. *Reed*, 19 How. 359; *Vanderwater* v. *Mills*, 19 How. 82, 89;

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Greene v. *Ely*, 2 Greene, (Iowa,) 508; *Howard* v. *Veazie*, 3 Gray, 235; *Parker* v. *Anthony*, 4 Gray, 290; *Metcalf* v. *Hunnewell*, 1 Gray, 297; *Simpson* v. *Dalrymple*, 11 Cush. 308; *Ayres* v. *Revere*, 1 Dutcher, 474, 481; *Choteau* v. *Thompson*, 2 Ohio State R. 114; *Harlan* v. *Rand*, 27 Penn. State R. 511; *Bottomly* v. *Grace Church*, 2 Cal. 90.

METCALF, J. The petitioners' lien, if they have one, is given by *St.* 1855, *c.* 231. They have none under any other law. The first section of that statute is thus: "Whenever, by virtue of any contract, expressed or implied, with the owners of any ship or vessel, or with the agents, contractors or subcontractors of such owners, or any of them, or with any person having been employed to construct, repair or launch such ship or vessel, or to assist them, money shall be due to any person for labor performed, materials used, or labor and materials furnished in the construction, launching or repairs of, or for constructing the launching ways for, or for provisions, stores or other articles furnished for or on account of any ship or vessel in this commonwealth, such person shall have a lien upon such ship or vessel, her tackle, apparel and furniture, to secure the payment of such debt." The petitioners claim a lien on the three ships named in their petition, "for labor and materials furnished in the construction" of them. And their interpretation of the statute provision is, that it gives to every person, whom the owner of any ship owes for labor and materials furnished in its construction, a lien on such ship. The respondents' interpretation of it is, that it gives a lien only on the particular ship or ships for which the labor and materials were specifically furnished. And the court are of opinion that the respondents' interpretation of it is right. A "lien upon such ship" seems to us to mean a lien upon the specific ship or ships, in the construction of which labor and materials are furnished, or for or on account of which supplies are furnished, by virtue of an express or implied contract. The petitioners therefore fail to establish a lien upon either of the aforesaid ships, for the reason that they did not, by virtue of any contract with Currier & Townsend, furnish labor and materials in the construction of any particular ship or

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ships. There is no allegation or proof that the petitioners made any contract with any other person or persons than Currier & Townsend.

We give to the statute in question the same construction which the circuit court of the United States gave to a statute of Maine, which was in these words: "All ship carpenters, caulkers, blacksmiths, joiners and other persons, who shall perform labor or furnish materials for or on account of any vessel building or standing on the stocks, by virtue of a written or parol agreement, shall have a lien on such vessel for his or their wages." On a libel *in rem* for labor upon a brig, under a contract for labor generally, it was held that this statute was applicable only to cases of an agreement for labor to be performed upon a particular vessel, as a distinct and independent service. "It is not," said Mr. Justice Story, "the mere naked fact, that labor and services have been performed, or materials used, upon a vessel, which entitles the party to a lien therefor. They must be done under a previous agreement. What agreement? Certainly an agreement, express or implied, relating to the particular vessel on which the labor and services are to be performed, or for which the materials are to be furnished. The contract, then, must be, not a general contract or retainer for labor and services, but a specific contract or retainer for the particular vessel embraced and referred to in the contract." *Read* v. *Hull of a New Brig*, 1 Story R. 250. So, under the same statute provision, it was decided by the district court of the United States, that to entitle a person to a lien on a vessel for materials furnished for and used in its construction, there must be an appropriation, express or implied, of the materials, to the particular vessel upon which the lien is claimed; and that such appropriation must be made at the time of the contract, or, at the latest, at the time of the execution of the contract by the delivery of the materials. Judge Ware said: "The words 'for or on account of' naturally and necessarily imply that they are furnished for the use of a particular and known vessel, and that this is one of the express or understood terms of the contract. For it cannot be pretended, when a person has sold mate-

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rials, in the ordinary course of trade, to a merchant or ship-builder, without reference to any particular vessel that is being built or under repair, that he has a lien, under this law, against any vessel to which the materials may happen to be appropriated." *Sewall* v. *Hull of a New Ship*, Ware, (2d ed.) 565.

Statute liens, which give a priority of payment to one class of creditors over another, are *stricti juris*, and are not to be extended beyond the clearly expressed intent of the legislature. *The Robert Fulton*, 1 Paine, 626. *The Kiersage*, 2 Curt. C. C. 421. *The Alida*, Abbott R. 169.

If the petitioners had, by contract, furnished materials for the construction of the same three ships which are named in their petition, without appropriation of any specific materials to either of those ships, we do not decide that they might not have had a lien on each ship, to secure payment for such portion of the materials as was used in the construction of it.

The court, being of opinion that the petitioners have no lien on either of the ships named in their petition, have not found it necessary to consider the other questions which were raised and argued.

GORDON K. TYLER & another *vs.* WILLIAM CURRIER & others.

No lien can be claimed on a ship under *St.* 1855, *c.* 231, for timber sold and delivered to the owner in another state, and by him brought into this commonwealth, and here used in building a ship, if there was no express agreement that there should be a lien, nor that the timber should be so applied.

HOAR, J. This is a petition to enforce a lien upon a ship under the provisions of *St.* 1855, *c.* 231.

Among the interesting and important questions arising in the case, which have been so fully and ably argued in writing by

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counsel, there is one which appears to the court decisive, and renders a consideration of any others unnecessary.

Currier & Townsend, who were building two ships at Newburyport, wrote to the petitioners, who resided at Baltimore, for a cargo of white oak plank, and the petitioners wrote in reply agreeing to sell the same. By the agreement of the parties, the petitioners chartered a vessel at Baltimore, for and in the name of Currier & Townsend, and delivered the plank on board; Currier & Townsend paying the price agreed by the charter party, and insuring the plank from Baltimore. The contract of sale and delivery was therefore made, and to be performed, in the State of Maryland, and was actually executed therein. The laws of Maryland, the *lex loci contractus*, consequently applied to and must govern the contract, and by those laws, and not by the laws of Massachusetts, the rights of the parties are to be determined. There was no agreement between them that the petitioners should have a lien. This would not be necessary, if the contract had been made in this commonwealth; because the law would then create the lien, and cause it to attach, as an incident to the contract. But no such law was in operation where the contract was made and performed. The property had vested in Currier & Townsend, without any lien attaching, by the delivery at Baltimore. They brought it into this commonwealth as their own unincumbered property. They were under no obligation, by their contract, to bring it to Massachusetts. They might have sold it from the vessel at Baltimore, or changed the destination of the vessel, with the consent of the owners. The interest created by a lien under the statute is not merely a part of the remedy, but is an interest in property, created by the law operating upon the contract of the parties.

It has been found by a jury in another suit, that a part of the plank was furnished to be used in the construction of the two ships before mentioned, which Currier & Townsend were building at the time the contract was made. But this, upon the facts agreed, we think must be understood to refer only to the purpose to which the purchasers expected to apply it at the time they purchased; or, at the utmost, to the purpose to which

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the petitioners understood it was to be applied. It is very clear that there was no stipulation or agreement that it should be so applied. *Petition dismissed.*

W. C. Endicott, for the petitioners.

C. T. Russell, for the respondents.

BENJAMIN DOW *vs.* JESSE BULLOCK.

Under the Rev. Sts. c. 15, § 33, and c. 28, § 141, a surveyor of lumber holds his office until another is chosen and qualified in his stead.

ACTION OF CONTRACT upon a promissory note, dated February 1st 1856. Answer, that the consideration was illegal and void, being lumber brought into the town of Haverhill by water, not intended for exportation, and sold without being first surveyed, marked and numbered as required by statute.

At the trial in the court of common pleas in Essex, before *Mellen*, C. J., it appeared that the note was given in payment for lumber brought into the Commonwealth by water; and in order to show that it was duly surveyed, the plaintiff testified "that he, acting in the capacity of surveyor, and supposing himself to be qualified in that office according to law, did survey, mark and number the lumber as the law requires," and introduced other evidence that he had repeatedly acted in the capacity of a legally qualified surveyor during the year commencing in March 1855.

To show that the plaintiff was never qualified as surveyor, the defendant introduced the records of the town of Haverhill, by which it appeared that the plaintiff was chosen and qualified as surveyor of lumber in March 1854; was again chosen in March 1855, but there was no record of his being sworn for that year; and was again chosen and sworn for the year commencing in March 1856.

The plaintiff requested the judge to instruct the jury, among

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other things, "that he, having been sworn into the office of surveyor in March 1854, and the term of his office, under Rev. Sts. c. 28, § 141, being for one year and until his successor was chosen, and he having been chosen again for the subsequent year, his former qualification might be taken to extend over the subsequent term, so as to render legal any acts done by him in good faith and in discharge of what he supposed to be his official duties."

But the presiding judge refused to give this instruction, and did instruct the jury "that if it should appear upon the evidence that the lumber was not surveyed, marked and numbered by a surveyor duly qualified, there was no sufficient survey, notwithstanding the party surveying supposed himself to be a duly qualified surveyor, and supposed himself to be acting in the discharge of his official duties, and notwithstanding he had been a duly qualified surveyor the year previous, and was again chosen for the year 1855, when the boards were sold, and notwithstanding he had repeatedly acted in good faith in the capacity of surveyor."

The jury found a verdict for the defendant, and the plaintiff alleged exceptions, which were argued at Boston in January 1859.

W. C. Endicott, for the plaintiff, cited Rev. Sts. c. 15, § 33; c. 28, §§ 39, 40, 54, 57, 68, 141; c. 24, §§ 23, 27; *Williams* v. *School District in Lunenburg*, 21 Pick. 75; *School District in Stoughton* v. *Atherton*, 12 Met. 105; *Colman* v. *Anderson*, 10 Mass. 113; *Margate Pier* v. *Hannam*, 3 B. & Ald. 269.

W. D. Northend, for the defendant. No action lies on a note, the consideration of which was lumber brought into the State by water and not surveyed here according to statute. Rev. Sts. c. 28, § 154. *Wheeler* v. *Russell*, 17 Mass. 258. 2 Parsons on Con. 252. A surveyor is not duly qualified until he has been sworn. Rev. Sts. c. 15, § 40. *Colburn* v. *Ellis*, 5 Mass. 427. His supposing that he was duly qualified is no excuse for his neglect to take the oath.

The statute contemplates that a surveyor shall be disinterested; and if a person, duly qualified to act as surveyor, can

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make a legal survey of his own lumber, any omission in his qualification should be regarded with jealousy.

An individual is not required to hold an office in the same town two successive years, and if a person is chosen and not sworn, the presumption is that he has declined. Rev. Sts. *c.* 15, § 43.

Dewey, J. The office of surveyor of lumber was, under the provisions of the Rev. Sts. *c.* 15, § 33, a continuing one until another person was chosen and qualified in place of the incumbent. Although the law prescribes an annual election, the office does not necessarily expire on the day of the annual election. The plaintiff was duly elected and qualified as such surveyor in the year 1854, and by virtue of the election was competent to act in 1855, if no other person had succeeded to his place. If it be said that the Rev. Sts. *c.* 28, § 141, only continue his office until another is "chosen," it may be replied that impliedly it excludes the oath also as a necessary qualification for the office, and thus the plaintiff could have been well appointed as surveyor in 1855; but we think this latter provision does not change *c.* 15, § 33, in either respect. We are therefore of opinion that the plaintiff was legally holding the office in 1855 under his election in 1854.

There is nothing in the case to show that there was any other person chosen as surveyor of lumber in 1854 or in 1855, and it appears that the plaintiff was himself in fact rechosen in 1856, and the case is therefore free from any embarrassment of deciding who was his successor. The decision of the present case only requires us to apply the principle of holding over by a legal incumbent to the next succeeding political year. For some period of that year he was certainly entitled to hold over, under the ordinary and well understood practice of holding over during the time elapsing between the choice, and the taking of the oath of office.

Without expressing any opinion beyond the question arising upon the present facts, the court are of opinion that the plaintiff was in February 1856 a legal surveyor of lumber, and as such competent to act *Exceptions sustained.*

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William T. Elliott *vs.* Hamilton Mutual Insurance Company.

An application for insurance, in which the applicant agrees that it is "a correct description of the property, so far as regards the condition, situation, value and risk on the same," and that "the misrepresentation or suppression of material facts shall destroy his claim for damage or loss," is not a warranty of the truth of the answers to interrogatories in it, except so far as they are material to the risk; although the by-laws, to which the insurance is expressly made subject, provide that the application shall be held to be a part of the policy and "a warranty on the part of the assured," and that "unless the applicant shall make a correct description and statement of all facts inquired for in the application, and also all other facts material in reference to the insurance, or to the risk, the policy shall be void." And the materiality of any answer is to be determined by the jury.

An application for insurance on a stock of goods represented that it was "all of goods usually kept in a country store," and that there was no "cotton, or woollen waste or rags kept in or near the property to be insured." The by-laws, to which the insurance was expressly made subject, provided that no building in which cotton or woollen waste or oily rags were allowed to remain at night should be insured; and that all cotton, woollen, hempen or oily waste, or rags, should be destroyed or removed every evening. *Held*, that the keeping of clean white cotton rags, if usually forming part of the stock of "a country store," did not avoid the policy.

Action of contract upon a policy of insurance on the plaintiff's stock of goods in his shop in Meredith Village, N. H., "under the provisions, conditions and limitations of the charter and by-laws of said company." Upon the face of the policy was this clause: "This policy is accepted by the insured, subject at all times to the conditions and regulations of the act of incorporation and by-laws of said company for the time being in force, which conditions and regulations are hereby declared to form a part hereof."

The by-laws contained these provisions: "Art. 6. The application upon which a policy is founded shall be held to be a warranty on the part of the assured, and as absolutely a part of said policy and of the contract of insurance as if it were actually incorporated therein in full."

"Art. 13. Unless the applicant for insurance shall make a correct description and statement of all facts inquired for in the application, and also all other facts material in reference to the

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insurance, or to the risk, or the value of the property, the policy issued thereon shall be void."

"ART. 28. No building in which cotton or woollen waste or oily rags are allowed to remain at or during the night shall be insured in this company. All damaged cotton or hemp, and all cotton, woollen, hempen or oily waste, or waste used about oils or mineral acids, or rags, shall be destroyed or removed to a safe distance from the premises insured, or to some place fireproof, every evening before dark."

At the head of the application for insurance was this notice: "No buildings will be insured by this company where cotton waste is kept." The application contained numerous printed questions and written answers, among which were these: "8. Is cotton, or woollen waste or rags kept in or near the property to be insured?" *Answer.* "None." "9. Of what does the stock in trade on which insurance is desired, consist?" *Answer.* "All of goods usually kept in a country store." Above the applicant's signature were printed these provisions: "And the applicant covenants and agrees with said company, that the foregoing is a correct description of the property requested to be insured, so far as regards the condition, situation, value, title and risk on the same;" "that he holds himself bound by the act of incorporation and by-laws of said company;" and "that the misrepresentation or suppression of material facts shall destroy his claim for a damage or loss."

At the trial in the court of common pleas in Essex, before *Mellen*, C. J., the plaintiff, who was the only witness examined on either side, testified that his business was "that of an ordinary country variety store; that from the date of the policy until the fire it was a part of his business to buy clean rags, in small quantities, and keep them until they amounted to some hundred or two hundred pounds, when he sold them; that at the time of the making of the application there were no rags on the premises or in the store, the last, amounting to some 200 pounds, more or less, having been sold some days previous; that, about the time he cleared out his stock, he made a bin for the purpose, among other things, of putting rags in, which he

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afterwards used for that purpose; that after the issuing of the policy, rags were again taken into the store until the time of the fire, so that, at the time of the fire, he had about two thousand pounds in the store; that they were all clean, white rags; and that, in the ordinary course of business, rags were not kept, except for immediate sale."

Upon this proof, the defendants contended that the answer to the eighth interrogatory in the application constituted a warranty, not only that no rags were kept in or near the insured property at the time said application was made, but also a warranty that none should be kept there during the continuance of the policy; and that the keeping of rags on the premises, as disclosed by the evidence, after the making of the policy, was a breach of said warranty, and avoided the policy.

The plaintiff controverted this position; and contended that said question and answer amounted, at the most, to a warranty that no rags were kept on the premises at the time when said policy was made; and that, in the absence of fraud, (which was not suggested,) the policy would not be avoided by keeping rags there afterwards.

The plaintiff also contended that said interrogatory did not apply to clean white rags, but that the word "rags" should be construed according to the words used in connection with it; and he offered to prove that "cotton and woollen waste" was a peculiarly hazardous article, being the waste of manufacturing establishments, generally oily and dirty; and also offered to prove, by the testimony of persons acquainted with insurance business, that the word "rags," used in this connection in an application for insurance, would be understood as applying only to oily rags, or rags used about machinery, and not to clean rags. But the court rejected this evidence; and ruled that, as matter of law, the word applied to clean, as well as to oily or dirty rags.

The plaintiff then contended that in fact he did disclose to the defendants that clean rags formed part of his ordinary stock in trade; and offered to prove that clean rags are uniformly part of the stock of "goods usually kept in a country

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store," precisely as these were kept; and claimed the right of submitting to the jury the question, whether or not, taking the whole application together, and more particularly the eighth and ninth answers, the fact that rags were part of his stock in trade was disclosed. And he tendered parol evidence to explain this answer, by showing that it was equivalent to saying "all the goods usually kept in a country store, to wit, hardware, groceries, dry goods, rags, &c." But the court rejected all this evidence; and ruled that no question of fact was open upon the construction of this application, and that the answer to the ninth interrogatory did not affect the construction to be given to the eighth answer.

Upon the construction of the eighth interrogatory and answer, the plaintiff contended that, if they were to be considered a continuing warranty, he had only warranted that things should remain substantially as they were, and not that there should be absolutely no variation; and that, in order to avoid the policy, the defendants must show that there had been a substantial alteration, affecting the risk; and he offered to prove, by the testimony of experts, that clean rags were not hazardous, nor deemed to be such by underwriters, and that the risk was no greater with these rags than without them.

But the court excluded this evidence also, and stated that the jury would be instructed, "that this application (being made part of the policy) contained a warranty that no rags, of any kind, were kept in or near the insured property, either for storage or for sale, and an agreement that none should be so kept; that if it was part of the plaintiff's business, from a time prior to the making of the policy until the time of the fire, to take in rags, either for storage or on sale, and keep them till they amounted to, say one hundred pounds, and then to sell them, even though he had none when the application was made, then there was a breach of that warranty, the policy did not attach, and the plaintiff could not recover; and that it was immaterial whether the risk was greater by reason of the introduction of these rags, or whether they in fact caused the fire."

The plaintiff thereupon submitted to a verdict for the defend-

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ants, and alleged exceptions, which were argued in Essex at November term 1858.

S. B. Ives, Jr. & J. B. Peabody, for the plaintiff.

O. P. Lord & J. W. Perry, for the defendants. The answer to the eighth interrogatory was a continuing warranty, or, at least, a warranty that it was not, at the time of the application, the habit of the applicant to keep rags on the premises as a part of his business, and does not refer to the question whether rags happened to be there at the moment when the application was signed. *Houghton* v. *Manufacturers' Mutual Fire Ins. Co.* 8 Met. 114. *Crocker* v. *People's Mutual Fire Ins. Co.* 8 Cush. 79. *Glendale Woollen Co.* v. *Protection Ins. Co.* 21 Conn. 19. *Sheldon* v. *Hartford Fire Ins. Co.* 22 Conn. 235.

The evidence offered and rejected was immaterial. The eighth interrogatory being specific and the answer clearly false, and the by-laws declaring the policy void if all the facts inquired for are not truly stated, the policy is void whether the facts are material or not; or rather the parties have agreed upon the materiality of the facts inquired for and stated, and they shall not now be allowed to prove them immaterial. 6th and 13th by-laws. *Davenport* v. *New England Mutual Fire Ins. Co.* 6 Cush. 340. *Miles* v. *Connecticut Mutual Life Ins. Co.* 3 Gray, 580. *Burritt* v. *Saratoga County Mutual Fire Ins. Co.* 5 Hill, 188. *Trench* v. *Chenango County Mutual Fire Ins. Co.* 7 Hill, 122. *Jennings* v. *Chenango County Mutual Fire Ins. Co.* 2 Denio, 75. *Wilson* v. *Herkimer County Mutual Ins. Co.* 2 Selden, 53.

The true construction of the eighth and ninth interrogatories and answers is, that in the course of the business the stock should consist of "goods usually kept in a country variety store," but that no woollen or cotton rags or waste should be kept. The insertion of a comma after the word "cotton" does not prevent its applying to the word "rags." *Manning* v. *American Board of Commissioners for Foreign Missions*, 8 Met. 566.

The words "oily" and "dirty" cannot be imported into the application by parol evidence; nor by reference to the twenty-eighth by-law, which applies only to a case where rags are allowed to be used on the premises.

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BIGELOW, J. The rulings of the court at the trial of this case were erroneous in several particulars.

The plaintiff, by his answers to the questions contained in the application, does not warrant that they are literally and absolutely true. Such might be the rule if they stood alone, unexplained by other stipulations in the application. But the whole paper is to be construed together, and effect is to be given to all its parts, if it can be done consistently with a fair and reasonable interpretation of the contract. We think the answers are qualified by the agreement which immediately follows them, and that the extent to which the assured is to be held responsible for their accuracy and truth is clearly indicated and fixed by the stipulation which he there makes. He agrees that the description of the property contained in his answers is correct only "so far as regards the condition, situation, value, title and risk on the same," and "that the misrepresentation or suppression of material facts shall destroy his claim for damage or loss." These stipulations were not only unnecessary, if the assured was to be held to the literal and exact truth of his answers, but are inconsistent with holding them to be strict warranties. The parties to the contract did not so regard them. It was only so far as they were material to the risk, or were misrepresentations or suppressions of material facts, that they were intended to affect the rights of the assured to recover on the policy. The plaintiff was therefore entitled to have the question, whether the rags kept in the store at the time of the fire materially affected the risk, passed upon by the jury.

This case differs from *Bowditch Mutual Fire Ins. Co.* v. *Winslow*, 3 Gray, 415, and 8 Gray, 38. In that case, the misrepresentation relied on related to the amount of incumbrances on the property, and affected only the title of the party insured. The covenant at the end of the application did not extend to representations concerning the title, but only to those affecting "the condition, situation, value and risk of the property;" the amount of incumbrances could hardly be material to the risk, and the by-laws expressly provided that the policy should be

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void unless the true title of the assured was expressed in the application. The assured in that case, therefore, were properly held to the strict truth of the statements as to the amount of incumbrances.

The construction put on the eighth interrogatory by the court was incorrect. If interpreted literally and according to the punctuation, as printed in the application, it would include only "woollen rags," and not those made of cotton. But if the latter are comprehended within the fair scope of the question, we think it can extend only to those which, from their nature or condition, are easily inflammable, and for that reason classed with "cotton and woollen waste." Clean white rags would not come within this description. This view is confirmed by the twenty-eighth article of the defendants', by-laws, annexed to the policy, in which it is provided that "no building in which cotton or woollen waste or oily rags are allowed to remain over night shall be insured by this company." We think it reasonable to infer that the eighth interrogatory was put with special reference to this clause in the by-laws, and that it is to be construed in connection with it as including only "oily rags."

It follows, that it was competent for the plaintiff to show that clean white rags commonly formed part of the stock of country stores, and that in this respect he had complied with the statement made in answer to the ninth interrogatory, by which his stock was described as being that which was usually kept in a country store. *Exceptions sustained*

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James F. Gile, Administrator, *vs.* Nathaniel Stevens & others.

The benefit occasioned to a meadow below a milldam, by a ditch dug at the time of the erection of the dam by the owner of the dam through his own land below the meadow cannot be set off against the damages done to the meadow by subsequent flowing occasioned by the dam; and the cost of the ditch is immaterial in assessing such damages.

On the trial of a complaint under the mill act, evidence that the withholding of water in the spring from other lands, situated like the complainant's, was a benefit greater than the injury occasioned by letting down the water in the dry season, is inadmissible, unless it appears that the water was withheld from the complainant's land in the spring, as well as suffered to flow upon it in the dry season.

Peat, dry or in process of curing upon a meadow, is personal property, and damages occasioned to it by the flowing of the meadow, cannot be recovered by complaint under the mill act.

Damages for the loss of manure placed upon a meadow for the purpose of cultivating it cannot be recovered, as a special item of damage, by complaint under the mill act.

Damages caused by flowing land below a milldam, unless caused by wrongful overflowing of the land, may be recovered by complaint under the Rev. Sts. c. 116.

Complaint under the mill act. After a trial before a sheriff's jury, the presiding officer certified to the court of common pleas the following case:

The respondents' mill is on Little River in Haverhill, which is principally relied on for water. The dam complained of was erected in 1839 by Ezekiel Hale, under whom the respondents claim, on his own land at the outlet of Great Pond, for the purpose of making a reservoir of water for the use of this mill in the dry season, and has since been used for that purpose. The water of the pond, when required for use, is brought through a small natural stream into Little River above the mill. The complainant's meadow is situated on this small stream, and some distance below the respondents' dam.

Hale, before he erected this dam, and in order to draw water more readily from the pond, purchased part of the meadow below the complainant's land, and dug a new channel through it, lowering the stream and somewhat altering its course, and cleared out the stream opposite the complainant's land, and thus drained that land, which was before wet and miry, and increased its value and enabled the plaintiff to improve it, which he did.

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Until five or six years ago, the water was drawn off from the pond, when it was needed for use in the dry season, in such a manner as not to overflow the complainant's land; but since that time "it has been let off usually in the months of August and September, in such quantities as at times to overflow the complainant's meadow, and to so saturate it with water as to stop all improvements, and greatly to injure, if not destroy, those which had been made; manure, which the complainant's intestate had carted on the meadow for the purpose of cultivating it, has been overflowed, washed away and lost; peat, dry or in process of curing upon the meadow, was overflowed and destroyed, and water remained upon the meadow for a length of time, and in so large quantities as were never observed before." For this overflowing, during the time set out in the complaint, and down to the death of the complainant's intestate, the complainant claimed damages.

The respondents offered evidence of the cost of the new channel cut below the complainant's land. But the evidence was excluded.

"Owners of meadow land, either contiguous to that of the complainant, or similarly situated, who were familiar with the effect of flowing and withholding the water from their meadows, were introduced as witnesses, and asked their opinion whether the withholding of the water in the spring did not benefit their own meadows more than they were injured by letting it flow upon them during the dry season." This evidence was not admitted.

The respondents requested that the jury might be instructed that the remedy for overrunning a meadow below a dam, by letting out at a particular time more water than the natural channel of the stream would accommodate, was by action at common law, and not in this form of proceeding; that "the true measure of damages is to be determined by taking into account the former condition of the meadow, and its capacity for improvement when the water ran in its natural channel, and the right of the respondents to flow the water back in the new channel, to a height not exceeding the old stream;" and that "the increased facilities, made by the mill-owner for draining

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water from the complainant's meadow, are to be taken into account, in connection with any injury occasioned by letting more water from the dam at particular seasons, than the ordinary run of water before the erection of the dam."

The presiding officer declined to give either of the instructions asked for by the respondents; but at the request of the complainants instructed the jury that "if by reason of the ditching originally done by those under whom respondents claim, the petitioner was enabled by further improvements made by himself to increase the value and productiveness of his meadow, and he did so, that increased value and productiveness are the property of the petitioner; and if the respondents, after such increased value and productiveness, but during the time set out in the complaint, changed the manner of managing the water by reason of their dam, so as thereby to cause the water to flow over petitioner's meadow to its injury, then the respondents are responsible for all the injury to it in its improved state, caused thereby; and the original benefit cannot be set off against such damages;" that "the jury must allow to the complainant for all damages done to the crops of his meadow, and for loss of peat and manure caused thereby; also for the damage done to the land by such flowing during the time set out in the complaint, and down to the intestate's death, by reducing its actual value; and a proper means of arriving at this part of the damages will be to find how much the land was reduced in value by flowing, during that time, and the amount it was so reduced will be a fair measure of this part of the damages."

The jury were further instructed "that if the meadow of the intestate was benefited by the respondents' dam, by the withholding of the water in the wet season and letting it on in the dry, or in any other manner by the dam or its operations, then they should allow, by way of set-off, all such benefits, and deduct the same from any damages they might find."

The verdict was for the petitioner. The respondents excepted to all the above rulings and instructions, and, the verdict being accepted by the court of common pleas, appealed to this court, before whom the case was argued in February 1859

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J. G. Abbott & O. Stevens, for the respondents.

D. S. Richardson, for the complainant.

METCALF, J. 1. The cost of the channel made by the respondents below the land flowed by them was immaterial. Evidence of its cost was therefore rightly excluded.

2. Testimony as to the effect, on other lands, of the withholding of water therefrom in the spring and setting it on in the dry season, was rightly rejected; because it does not appear that water was withheld from the complainant's land, in the spring. Such may have been the fact, but the case does not show it. Both the causes and the effect on other lands are not shown to have operated on the land of the complainant.

3. We are of opinion that the jury were wrongly instructed that they should give damages "for loss of peat and manure," caused by flowing the land. The peat, which was on the land, was personal property; and damages for injury to it are not recoverable in this process. And if the manure was not part of the real estate, the complainant is not entitled to damages for the loss of it by flowing. The value of real estate is increased by the manure that forms part of it, and of course the damage to the realty, caused by flowing, may be greater when it is manured than when it is not. But there is no reason for making the manure a special item of damage. Whether the manure was, in this case, a part of the real estate, does not appear. On this ground the exceptions are sustained.

4. Since the passing of the *St.* of 1824, *c.* 153, (which is incorporated into the Rev. Sts. *c.* 116,) this process has been maintainable for the recovery of damages caused by flowing land below a milldam. *Shaw* v. *Wells*, 5 Cush. 537. But damages caused by occasional abuse of the right of flowing are not thus recoverable. For wrongful overflowing of land below a dam, the remedy is by action at law. Assuming that the present process is for damages recoverable under it, we are of opinion that the other instructions given to the jury were substantially correct, and that the respondents have no legal ground of exception to the denial of their prayers for different instructions.

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Zachariah Morgan *vs.* Julius H. Morse.

An auditor's report is *prima facie* evidence, but does not change the burden of proof.

An instruction to the jury, that the burden of proof is upon the defendant to overturn or control an auditor's report in favor of the plaintiff, is no ground of exception, if it does not appear that the distinction between being *prima facie* evidence and changing the burden of proof was brought to the attention of the court.

A ruling that the plaintiff has a right in the first instance to rely upon an auditor's report in his favor, and, if the defendant should offer evidence tending to control that report, then the plaintiff, as a matter of right, might give evidence in support of his case, is no ground for setting aside the verdict.

In an action to recover the price of bricks of a certain kind, a building contract between the defendant and a third person, by which the latter agrees to take the bricks purchased by the defendant at the same prices as those now charged by the plaintiff to the defendant, is admissible in evidence, against the defendant, of the kind and price of the brick.

Action of contract to recover for "jobbing brick" and "hard brick," particularly mentioned in the plaintiff's bill of particulars, sold by the plaintiff to the defendant. The case was sent to an auditor, who made a report thereon in favor of the plaintiff. Trial in the court of common pleas in Essex, before *Briggs*, J., who signed this bill of exceptions:

"The plaintiff read to the jury the auditor's report, and then stated that he would rest his case, but should ask the privilege to put in other testimony after the defendant had met the report. To this the defendant replied, that he should object to any evidence which was not strictly rebutting testimony. But the court ruled that the plaintiff could in the first instance rely upon the auditor's report, without going further; and that if the defendant offered evidence tending to control the report, then the plaintiff, as a matter of right, might put in evidence generally in reply and in the support of his case. To this the defendant excepted.

"The defendant then offered evidence tending to prove that the bricks delivered to the defendant were not such as mentioned in the plaintiff's bill of particulars, but were of a much inferior quality, and that there were not so many delivered as charged and found delivered by the auditor's report. After the defendant had closed his case, the plaintiff offered evidence generally to

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support his case, tending to prove a contract between the parties on the kind, quality and number of brick delivered; which evidence, under the foregoing ruling, was admitted, although against the defendant's objections.

"The plaintiff proved the execution of a building contract between the defendant and Enoch Pratt, by which Pratt, among other things, 'agrees to lay the brick purchased by the said Morse of Zachariah Morgan, and allow him, on final settlement, the following prices, viz: for red and soft brick $5.75, for hard brick $7, and for faced brick $13.50, and cost of freight and teaming;' and then offered this contract to show the declarations and admissions of the defendant as to the kind of brick he bought of plaintiff, and as to the price; and the court admitted it for that purpose. The defendant objected to this evidence, as it did not tend to prove that the bricks delivered were of the kind mentioned in plaintiff's bill of particulars.

"The plaintiff also offered evidence, against the defendant's objections, tending to prove that the defendant sold the brick to said Pratt for the same prices charged by the plaintiff to the defendant; which evidence the court admitted.

"The court instructed the jury that the burden of proof was upon the defendant to overturn or control the auditor's report.

"To all of which rulings the defendant excepts," and his exceptions were argued at Boston in January 1859.

D. Saunders, Jr. for the defendant. 1. The plaintiff, after he had rested and closed his case, could not, as a matter of right, reopen it and introduce evidence generally in support of his claim. *Jones* v. *Kennedy*, 11 Pick. 125. *Underhill* v. *Agawam Mutual Fire Ins. Co.* 6 Cush. 440. *York* v. *Pease*, 2 Gray, 282. *Chadbourn* v. *Franklin*, 5 Gray, 312. *Holbrook* v. *McBride*, 4 Gray, 215. *Rex* v. *Stimpson*, 2 Car. & P. 415. *Knapp* v. *Haskall*, 4 Car & P. 590. *Rex* v. *Hilditch*, 5 Car. & P. 299.

If, under the discretion of the court, the plaintiff might be permitted to introduce evidence out of the regular course of proceedings, in this case, that discretion was not exercised; and the defendant had no opportunity to present any matter, which might influence such discretion. *Haynes* v. *Saunders*, 11 Cush. 538.

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2. The contract of the defendant with Page had no tendency to show admissions of the defendant that the plaintiff delivered the kinds of brick mentioned in his bill of particulars. And the price for which the defendant sold the brick was entirely immaterial and irrelevant, and only tended to prejudice the minds of the jury. *Gardner* v. *Field*, 1 Gray, 151. The admission of irrelevant and immaterial evidence is sufficient ground for setting aside a verdict. *Ellis* v. *Short*, 21 Pick. 142. *Walker* v. *Leighton*, 11 Mass. 140. *Brown* v. *Gordon*, 1 Gray, 182.

3. The burden of proof was, through the trial, upon the plaintiff, and at no time shifted upon the defendant. The defendant, under any circumstances, was only required to produce evidence which would leave it doubtful in the minds of the jury, whether the auditor's report should stand or not. *Powers* v. *Russell*, 13 Pick. 69. *Tourtellot* v. *Rosebrook*, 11 Met. 460. *Beals* v. *Morrison*, 11 Met. 470. *Morrison* v. *Clark*, 7 Cush. 213. *Delano* v. *Bartlett*, 6 Cush. 364. *Snow* v. *Batchelder*, 8 Cush. 513. *Blanchard* v. *Young*, 11 Cush. 341. *Crowninshield* v. *Crowninshield*, 2 Gray, 524. *Central Bridge* v. *Butler*, 2 Gray, 130.

N. W. Harmon, for the plaintiff.

Bigelow, J. The cases heretofore decided by this court, in regard to the effect to be given to auditors' reports as evidence, are *Allen* v. *Hawks*, 11 Pick. 359; *Lazarus* v. *Commonwealth Ins. Co.* 19 Pick. 81; *Jones* v. *Stevens*, 5 Met. 373; *Taunton Ins. Co.* v. *Richmond*, 8 Met. 434; *Barnard* v. *Stevens*, 11 Met. 297, and *Locke* v. *Bennett*, 7 Cush. 452. In all these cases it is held that the report of an auditor upon any matter properly submitted to him, is *prima facie* evidence of the facts found by him. In two of them, *Allen* v. *Hawks* and *Jones* v. *Stevens*, it is said to have the effect of changing the burden of proof. But it is quite obvious, on an examination of those cases, that it was not intended to hold, that the burden of proving the issue, or of establishing a proposition of fact essential to the maintenance of the case of a party in whose favor the auditor had found, was thereby shifted. The phrase "burden of proof," was there used, not in its technical sense, to indicate that a new and distinct proposition or issue of fact was to be established by the party

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against whom the report of the auditor had been offered in evidence, but only as signifying that thereby a *prima facie* case was made out, and that it was incumbent on the other party to offer evidence to rebut and control it, or else it would be conclusive. This mode of using the phrase, though somewhat loose and inaccurate, is quite common, and where not improperly applied to a case, so as to confuse or mislead the jury, cannot be held to be a misdirection. *Powers* v. *Russell*, 13 Pick. 76. *Delano* v. *Bartlett*, 6 Cush. 368. In this sense it was manifestly used in the present case. The attention of the court was not called to the distinction between that evidence which was sufficient to impeach and overcome a *prima facie* case, and that which was necessary to sustain the issue on the part of the plaintiff. No instruction was asked by the defendant upon this subject. It would have been more correct for the court to have instructed the jury that the report of the auditor in favor of the plaintiff was *prima facie* evidence, and sufficient to entitle him to a verdict, unless it was impeached and controlled by the evidence offered by the defendant. But we see no reason to believe that the instruction given was not properly understood, or that the defendant was in any way aggrieved thereby.

The evidence of the contract executed by the defendant was competent as an admission by him of the kind and quality of brick, designated as jobbing and hard brick, which the plaintiff had agreed to furnish him. And this evidence, as well as the other testimony offered by the plaintiff, was properly admitted, after the defendant had introduced his proof, for the purpose of impeaching and overruling the report of the auditor. Its admission at that stage of the trial was entirely within the discretion of the court. That discretion would have been wisely exercised in this case, according to the well settled practice in this commonwealth; and although the evidence was admitted as a matter of right, we cannot see that the defendant was thereby prejudiced. *Exceptions overruled.*

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PRESIDENT, DIRECTORS AND COMPANY OF THE MALDEN BANK *vs.* JAMES W. BALDWIN.

A presentment for payment at any bank in Boston, of a note payable "at bank in Boston, or "at either bank in Boston," is a sufficient demand upon the maker to charge the indorser.

ACTION OF CONTRACT on a promissory note made by a resident of Vermont, and payable "at bank in Boston" to the order of the defendant, and by him indorsed.

At the trial in the superior court of Suffolk, the only demand of payment upon the makers that was proved was, that the note was presented for payment by a notary public on the day of its maturity at the Suffolk Bank in Boston; and the notary was answered "no funds" at said bank; whereupon he protested the same, and notified the defendant as indorser.

The defendant contended that this did not in law amount to a sufficient demand upon the makers of the note, to render the defendant liable as indorser.

But *Abbott*, J. ruled "that such demand was sufficient in law, that the holder of a note like this might elect to present it for payment at any bank in Boston, unless the maker had given notice at which bank he desired it presented; and that a presentment at such bank was a good presentment, for the purpose of charging the indorser, whether the maker of said note had notice at what bank said note would be presented or not."

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions, which were argued at March term 1859 in Suffolk.

F. A. Brooks, for the defendant.

J. D. Ball, for the plaintiffs.

BIGELOW, J. We think it very clear that the stipulation in the note declared on, making it payable "at bank in Boston," which is the same in effect as if it had been payable at any bank in Boston, was not inserted for the benefit of the maker. His liability was fixed and absolute, whether the note was

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presented for payment or not. *Carter* v. *Smith*, 9 Cush. 321. The object of the stipulation therefore was to accommodate the payee or holder by giving to him the right to elect the place at which the note should be presented in order to charge the other parties liable thereon. *North Bank* v. *Abbot*, 13 Pick. 465. But it cannot be reasonably supposed that it was thereby intended to impose any other or greater duty on the holder in making due presentment, than if the note had been made payable generally in any town or city, without designating the banks therein as the place of payment. If, for example, the note in this case had been payable in Boston only, the maker having no place of business or domicil there, it would have been sufficient, in order to charge the indorser, if it appeared that the note was in Boston on the day of its maturity, so that the promisor could have there found it, if he was ready to make payment. Story on Notes, § 231. *Mason* v. *Franklin*, 3 Johns. 206. *Boot* v. *Franklin*, 3 Johns. 208. So if it had been made payable in two places, as, for instance, in Boston or Cambridge, the holder would have had the right to present it at either place at his election, and would not be bound to present it at both in order to charge the indorser. Bayley on Bills, 232. Story on Notes, § 231. *Beeching* v. *Gower*, Holt N. P. 313. In like manner, if it had been payable in any particular street or square of a city, a presentment there would have been sufficient, and the note would have been dishonored, if not paid by the maker. But in none of those cases would it have been necessary for the holder to give notice to the maker at what particular place in the city, street or square the note would be presented for payment at its maturity.

Indeed, in many cases, if such notice were necessary, a note made payable at any bank in a city would be a more onerous contract to the holder than if no place for payment had been designated, because it might often be more troublesome to prove a previous notice to the maker than an actual presentment to him on the day of payment. To require such notice would defeat the purpose of the stipulation, and by imposing a new duty on the holder of such notes would tend to check instead of pro-

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moting the facility of their negotiation. The maker's promise is to pay at any one of the places designated, at which the holder may elect to present his note, and the duty is imposed on him to look at all these places for it, or provide funds to pay it at all of them when it is due. If he fails to do so, the note is dishonored. Such has been the construction put on notes of similar tenor in *Page* v. *Webster*, 15 Maine, 249; *Langley* v. *Palmer*, 30 Maine, 467; and *Jackson* v. *Packer*, 13 Conn. 342.

We are aware that in *North Bank* v. *Abbot* and *Carter* v. *Smith*, above cited, a different doctrine was intimated; but the observations of the court on this point were only *obiter dicta*. As applied to contracts generally other than negotiable notes, drafts and bills of exchange, they may be perfectly sound. But these last constitute an exception to any such rule, on account of the necessity which exists for securing their free and unrestrained circulation; and we are satisfied that it would tend to clog the facility of their negotiation, and violate the well settled practice of the mercantile community, to require that the holder should give to the maker notice of the place where he intended to present his note for payment at its maturity.

*Exceptions overruled.**

* A similar decision was made in Hampden at September term 1859 in

HAMPDEN FIRE INSURANCE COMPANY *vs.* SIDNEY G. DAVIS,

which was an action by indorsee against indorser of a promissory note payable "at either bank in Boston," and indorsed by the plaintiffs before maturity to the Chicopee Bank in Springfield, and by their cashier to the cashier of the Suffolk Bank in Boston. When the note fell due, it was, by request of the cashier of the Suffolk Bank, presented by a notary for payment at that bank, and duly protested for nonpayment. The maker of the note and the defendant both had their places of business in Boston; but neither of them had notice, before the maturity of the note, at what bank in Boston it would be presented for payment. The case was submitted upon a statement of facts, of which the above is the substance, to the decision of the court, who gave *Judgment for the plaintiffs.*

R. A. Chapman, for the plaintiffs.

A. L. Soule, for the defendant.

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Joshua Merrill & others *vs.* Samuel McIntire.

The incorporation, pursuant to *St.* 1854, *c.* 454, of an unincorporated loan fund association, does not affect the right of its trustees to maintain an action on a bond previously given to them.

A bond to the trustees of an unincorporated loan fund association, (the articles of which provide for the termination of the association so soon as its funds shall attain a certain amount,) for the payment of a certain sum monthly so long as the association shall exist, is not void for uncertainty.

A bond to the trustees of an unincorporated loan fund association, (the articles of which provide that it shall terminate as soon as its funds shall be sufficient to pay five hundred dollars to each member to whom no advance shall have been made,) by a member who, offering the highest premium, has obtained an advance of five hundred dollars, deducting that premium — to secure the payment, monthly, during the existence of the association, of a sum equal to his monthly due of two dollars, and interest at the rate of six per cent. a year on the whole amount advanced, is not usurious.

After a verdict and judgment for the penal sum, in an action for breach of the condition of a bond, the defendant, upon a hearing to ascertain the amount due and payable in equity and good conscience, pursuant to the Rev. Sts. *c.* 100, § 9, may prove any payments on the bond, although not set up in his answer to the declaration.

Action of contract, commenced on the 2d of October 1856, upon a bond, dated April 25th 1854, made by the defendant to the plaintiffs as trustees of the Merrimac Mutual Loan Fund Association in Lowell, in the penal sum of $1,650, "to be paid unto the said association, its successors and assigns," upon this condition:

"The condition of this obligation is such, that if the above bounden obligor, his heirs, executors or administrators, shall pay or cause to be paid to the above mentioned obligors, their successors or assigns, the sum of twenty eight and $\frac{25}{100}$ dollars per month, on the fourth Monday of each and every month, as long as the association of which the said obligor is a member shall continue; and also all fines which shall be charged to the said obligor, pursuant to the articles of said association, during said period; and shall also keep or cause to be kept all his other covenants, promises and agreements entered into by him as a member of said association and subscriber for the shares thereof, according to the true intent and meaning of said articles, then this obligation shall be void; otherwise it shall remain in full force and virtue."

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The declaration averred that the defendant had not paid the sum of $28.25 per month, nor the fines charged to him, nor kept his other covenants, promises or agreements, according to his bond and the articles of association.

Answer, that the bond was void, because there was not such an association as was named therein, having a legal existence as such, so as to make such a contract; because the conditions of the bond were uncertain; because the bond was usurious, unconscionable and against law, in fact, as well as upon its face; and because, if there ever was such an association, it had ceased to exist before the commencement of this action, and the plaintiffs had no authority to institute this action.

At the trial in the court of common pleas in Middlesex at March term 1858, before *Perkins*, J., the plaintiff put in the bond, and rested his case. The defendant introduced no evidence, and admitted that the association was in existence when the bond was given, under articles, parts of which are copied in the margin;* but contended that the bond was void

* We, the undersigned, having associated and formed a company for the purpose of accumulating a fund for the purchase of real estate, making improvements thereon, and removing incumbrances therefrom, and for any other legal use, and for the further purpose of accumulating a fund to be returned to its members who do not obtain advances as above mentioned, when the funds of the association shall amount to five hundred dollars per share, do severally agree that the following articles shall govern us, and determine our rights, duties and privileges, as members of such association. The number of shares shall not exceed fifteen hundred.

ART. II. *Members.* The members of this association shall be those who shall sign the articles of association, pay the entrance fee, and shall hold one or more shares.

ART. III. *Officers, and how chosen.* The officers of this association shall be a president, vice-president, twelve directors, secretary, and surveyor. The election of officers, after the first year, shall be by ballot, and shall take place annually, except the secretary and surveyor, who shall be elected permanently, and continue in office, unless removed as hereinafter provided. All officers must be members of the association.

ART. IV. *Board of Directors, and their Duties.* The board of directors shall have the general supervision, direction and management of the affairs of the association, and the duties of its officers. They shall elect from their number

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upon its face, for uncertainty, and because it was usurious; and that the association had ceased to exist, by accepting on

three trustees of this association, who shall, as such trustees, be vested with all property, bonds, mortgages and other legal instruments belonging to the association, in such form as the directors shall approve of.

ART VIII. *Surveyor, and his Duties.* It shall be the duty of the surveyor of this association to personally examine all property offered as security for advances to be made by the association, immediately upon the purchaser furnishing him with the location and description of his property. He shall thereupon, and without delay, report to the board of directors a full and minute description of such premises as he has examined, together with the value thereof, and his opinion thereon, which statement and opinion shall be in writing, and shall be filed with the papers connected with such property. The board of directors, if they are satisfied with such statement and the value of the premises, shall proceed to pass upon the same, provided they are satisfied with the title.

ART. IX. *Monthly Dues, and Fines for Nonpayment.* Every member of this association shall, during the week next preceding every regular meeting after the organization of this association, and during its continuance, pay two dollars as monthly dues for each share held by him, and, for any neglect in so doing, shall be fined for every nonpayment on each share as follows: For the first month, twelve and a half cents; second month, twenty five cents; third month, thirty seven and a half cents; fourth month, fifty cents; and every succeeding month, one dollar. All shares, on which no payment has been made for six months, shall be forfeited. All payments by a member shall be applied to the oldest charge against him on the books. No payment of monthly dues or fines shall be received from any member, except for the whole amount of such dues and fines due by such member at the time of tendering such payment, except allowed by the board of directors. Members, paying their monthly dues three months or more in advance, shall be entitled to interest at the rate of six per cent. per annum.

ART. X. *Entrance Fee.* Every member of this association shall pay an entrance fee of one dollar per share, until the conclusion of the third regular meeting of the association, after which time new members shall pay such increased entrance fee and the monthly dues from the commencement of the association, as the board of directors shall judge sufficient to place the new member upon the same footing as the original shares. All shares on which an entrance fee only has been paid shall become forfeited in two months after they shall have been subscribed for. The arrears for new shares shall be paid in full, or in such instalments and under such penalties as the board of directors shall determine.

ART. XIII. *Purchase of Shares.* As soon, and as often thereafter, as the funds of the association shall amount to the sum of five hundred dollars, (one share,) the same shall be put up to competition among the members, by the presi

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the 25th of January 1855 the St. of 1854, c. 454, and thereby making themselves a corporation, and thus changing the terms

dent, at a regular meeting of the association, and the member offering the highest premium for the same shall be entitled to it, for the purpose of building or purchasing freehold or leasehold premises, or removing incumbrances therefrom, or any other legal use; and he shall secure the payment of his subscriptions, interest, fines, &c., by a mortgage to the association, upon real estate, satisfactory to the directors. In case a member is desirous of procuring more than one share, he shall have the privilege (after having offered the highest premium for one) of receiving fourteen more shares, at the same amount of premium, out of the next moneys to be received, provided he subscribes and pays the value of such additional shares as have not already been subscribed and paid for, and at the time of purchase pays the sum of one dollar on each share purchased; which, in addition to the interest hereinafter mentioned, shall be forfeited, in case the member should refuse or neglect to receive said share or shares. But no member shall purchase more than fifteen shares. The purchaser of any shares shall pay an interest, from the time of purchase, of six per cent. per annum, payable monthly, as a redemption fee; and in case the member so purchasing shall fail to comply with the terms of purchase, he shall be charged with the interest for the time the association may be deprived of the same through his neglect. Members may purchase fractional parts of a share, not less than one fourth, provided they shall subscribe for and pay the dues on the whole share. The member so purchasing shall, within one week after becoming the purchaser of such share or shares, tender to the secretary, to be submitted for the approval of the proper officers, a written statement of the location, description and value of the property which he proposes as security for the property to be advanced by the association. If the officers are satisfied with the sufficiency of the value of the security thus offered, the association shall advance the amount to the member, when the directors of the association shall be satisfied with the title thereto, and upon the execution of proper instruments. In case the member should build, the money shall be advanced in sums necessary for the prosecution of the building until its completion, the association executing an agreement to that effect at its own expense. In such case, the member shall present a written certificate from the builder engaged in the erection of the building, certified by the surveyor of the association, of the sum necessary for such purpose. But no money shall be advanced for the purpose of building, unless the board of directors are satisfied that it is safe and proper so to do, and a bond and mortgage, under the direction of the board, shall have been executed and delivered by the member to the association.

ART. XIV. *Mortgaged Premises to be kept Insured, free from Taxes, &c.* All property mortgaged to this association shall be kept fully insured against fire, in some good office to be approved of by the board of directors, and the policy to be assigned to the association, except when such assignment shall be impracti-

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of the contract declared upon. But the court ruled that the bond was not void upon its face, for any of the reasons stated;

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cable, and the directors deem the security sufficient without it; the premiums to be paid by the association and charged to the member mortgaging the same, who shall repay the amount of such premium at the time his next subscription to the association falls due. He shall also keep the property free and clear from all arrears of ground rent, taxes, water rent, and assessments. In case default be made in payment, the secretary shall pay the same immediately out of the funds of the association, and charge the same to the member, who shall be fined, at the discretion of the board of directors, in any amount not exceeding one dollar for each default, and the mortgaged premises shall be subject to all such charges and fines.

ART. XVII. *Redemption of Mortgaged Premises.* When any mortgagor to this association shall desire to redeem his premises from the mortgage upon them, he shall give seven days' notice to the secretary before the next meeting of the board of directors. The secretary shall lay the matter before them, and they shall decide the amount to be paid by the mortgagor. In case the sum is agreed to by the mortgagor, he shall pay the said amount, and receive a discharge of release of the mortgaged premises, and all the papers and documents connected therewith, and be clear from all further payment to the association in regard of such share or shares with which he built or purchased the said premises.

ART. XXII. *Investment of Surplus Funds.* All funds of the association, beyond what shall be required for advances to members, shall be invested upon bond and mortgage, and shall be recommended and approved by the board of directors.

ART. XXIII. *General Fund.* All fines, monthly dues, fees, bonds, premiums and interest, received by the association, shall be considered as assets thereof, and applied to the general fund; and all moneys received by the association shall be bankable.

ART. XXVI. *Votes.* On all votes taken at any meeting of the association, each member shall be entitled to one vote, who shall not be in arrears two months; and in all elections or ballots, the roll of members shall be called, and the secretary shall ascertain whether members voting are in arrears.

ART. XXX. *Termination of the Association.* Whenever it shall appear by the books of the association that there is sufficient money on hand and due the association to pay on each unpurchased share, to the holder thereof, the sum of five hundred dollars, over and above all debts and liabilities of the association, all arrears of monthly dues, fines and otherwise, shall become payable at once. The board of directors shall then pay, satisfy and discharge, first, all debts and liabilities of the association, and then pay over, to the owner of such unpurchased share, an equal dividend of all sums on hand, and which shall afterwards be received, until the whole shall be divided; and, from the time of the commence-

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and that the acceptance of the act of 1854, if proved, would not defeat the plaintiff's right to recover upon the bond.

The defendant then submitted to a verdict for the amount of the penalty of the bond, and proposed to go to the jury to determine the amount due under the bond, and offered to prove that, since the execution of the bond, the association had become a corporation as above stated, and also that he had made sundry payments thereon. But the court rejected the evidence, and ruled that evidence of payments was inadmissible, because that defence was not alleged in the defendant's answer.

The jury found that the amount actually due, in equity and good conscience, upon the bond, was $1,454. The defendant alleged exceptions, which were argued at Boston in Febru ary 1859.

R. B. Caverly, for the defendant. 1. By accepting the act of 1854, the association, as such, ceased to exist. The defendant should have been permitted to prove this fact, if not in bar of the suit, at least as bearing upon the question of the amount of damages.

2. The bond in suit is void for uncertainty. By the terms of the bond, and of the mortgage given to secure it, the defendant may be held to keep paying forever; for the association may be continued through all time. It is not in the power of the defendant to obtain a discharge of either; nor is the amount to be paid capable of computation. Chit. Con. (8th Amer ed.) 53, 54. *Hinds* v. *Chamberlin*, 6 N. H. 227.

3. The bond is void, because its conditions are against law. It violates the law against usury. Chit. Con. 586, 597, 603 Story on Notes, § 189. It violates the law of mortgages; for the defendant can never redeem, except upon a contingency, or by

ment of the payment of such dividends, no further monthly dues or premiums shall be payable, except that all arrears shall be fully paid up; and the trustees shall deliver to each mortgagor, who has complied with the conditions of his mortgage, a discharge, and all papers connected therewith. After the performance of the foregoing duties, this association will cease to exist. This article shall not be altered, amended or repealed, without a vote of two thirds of those who have not purchased their shares, or any part thereof.

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the plaintiffs' consent. Arts. 13, 17, *ante*, 160, 161, *note*. The bond is, upon its face, unconscionable, and beyond the power of the association to require. Story on Bailments, §§ 318, 345 Chit. Con. 616. *Josephs* v. *Pebrer*, 3 B. & C. 639.

4. The defendant, after submitting to a verdict for the amount of the penalty of the bond, had the right to claim an assessment of damages by the jury, and to prove any payments which he had made, as tending in equity to limit the amount for which execution should issue. In such a case, no specific answer is required by law. Rev. Sts. *c.* 100, §§ 8, 9. *St.* 1852, *c.* 312, §§ 14–18. *Waldo* v. *Fobes*, 1 Mass. 10. *Sevey* v. *Blacklin*, 2 Mass. 542. *Bryson* v. *Ker*, 4 S. & R. 308.

B. F. Butler & W. P. Webster, for the plaintiffs.

Merrick, J. It was agreed by the parties at the trial that the Merrimac Mutual Loan and Fund Association, of which the plaintiffs are the alleged trustees, originally consisted of proprietors united with each other under written articles, copies of which were furnished to the court at the argument, and that they subsequently became incorporated under the provisions of the *St.* of 1854, *c.* 454. After the plaintiffs had proved and put into the case the bond declared on, the defendants contended that it was void upon its face for uncertainty, and also because it was made upon a usurious consideration, and because, the association having ceased to exist, there was no longer any party in existence competent to prosecute the suit. These objections were all overruled by the court.

1. The ruling in relation to each of these particulars was correct. The object and purpose of the statute, in authorizing voluntary associations to organize themselves into bodies corporate, were not to dissolve or destroy, but to afford them increased facilities in the transaction of their business, and to secure the durability essential to the accomplishment of the end for which they were designed. In availing themselves of the provisions of the statute, the associates therefore lost none of the rights which they had previously acquired. The choses in action which belonged, and the debts which were due to them, were, in legal effect, and by operation of law, transferred and assigned to the

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corporation, and were to be enforced and collected for the mutual benefit of the associates in the new relation to each other which they assumed. The assignment of a chose in action is a complete transfer of the contract to the assignee, and entitles him to all the benefits and advantages to be derived from it; but does not confer upon him the right to enforce the performance of it by any legal proceeding in his own name. But, as a legal and necessary result of the assignment, he may institute and pursue suitable and appropriate suits in the name of the assignor, who cannot, by any act whatever, deprive him of its use for that purpose. An action may therefore well be maintained upon the bond declared on, in the name of the assignors, for the recovery of the money for which the defendants still remain indebted. *Brigham* v. *Clark*, 20 Pick. 43. *Jones* v. *Witter*, 13 Mass. 304.

2. There is no ground for affirming that there is apparent upon the face of the bond any such uncertainty in its terms as would render the performance of its condition impracticable, or as would even make it difficult for the obligor to ascertain the extent and limit of his responsibility and the means of obtaining his discharge. It provides for the monthly payment of a specified sum of money during the continuance of the association. The only uncertainty, which is apparent upon a perusal of the terms of the bond, is in relation to the period of time, during which the association is to continue in existence, and the monthly payments are to be made. But these are facts which may be determined upon a resort to extrinsic evidence. If it should be objected that no such evidence could be found, or, if found, would be indefinite and unsatisfactory, the answer is, that if in such a contingency the parties should be left in entire uncertainty in relation to their respective rights and obligations, this difficulty does not arise upon the face of the bond, but upon the imperfection of the proofs resorted to for explanation.

But without relying upon this answer, it is sufficient that, upon referring to the articles which constitute the written agreement between the parties, provision is made for the termination of the association; art. 30. That end may be reached at an ear-

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lier or later day, as the business to be transacted shall be more or less profitable and successful. But though subject to contingencies which may perhaps create embarrassments and disappointment, still the termination of the association and the winding up of its affairs are distinctly provided for; and when those take place, the condition of the bond will be performed, and no further payments under it can be required.

The same articles also contain other provisions which may be resorted to by the obligor for relief against the supposed uncertainty upon which his objection is founded. They provide that all loans shall be secured by mortgage of real estate; art 13; and that estates mortgaged as security for the payment of a debt, or, as in this case, for the performance of the condition of a bond, may be redeemed; art. 17. Redemption of a mortgage is a payment of the debt for which it stands as collateral security. If the debtor shall not be satisfied with the claim which the officers of the association may decide to be due, he is not concluded by their determination; but may appeal to the proper legal tribunals to adjust the matters in controversy between them. On a bill in equity, if there were occasion to resort to it, the rights of the respective parties might be investigated, and such decree entered as would secure to each whatever they were respectively entitled to require.

3. If it distinctly appeared, upon examination of the bond, that it was executed upon and for a usurious obligation, it would not follow that therefore it should be declared void. That is not the legal effect which follows upon the taking or reserving of a greater rate of interest than is allowed by law. The contract is valid, and still remains in force, although the securing or attempting to secure an unlawful compensation for the use of money loaned may subject the lender to the loss and penalties prescribed by the statute. Rev. Sts. *c.* 35, § 2. *St.* 1846, *c.* 199. The defendant's objection therefore, that the bond was void for usury upon its face, was very properly overruled.

But in truth, in looking at the actual transaction between the parties, the loan to the defendant does not appear to have been made upon any usurious consideration The monthly payment

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which he stipulated to pay as long as the association should continue to exist was not simply for the use of the money, or forbearance of repayment of the principal, but for the privilege accorded to him of becoming an owner of a certain number of shares, and of eventually taking the dividend to which, by the articles of agreement, he would, upon the winding up of the affairs and general settlement of the concerns of the association, be entitled. Whether the arrangement made was one which would be likely to result advantageously was a question upon which he was to exercise his own judgment. All the associates had the same right. Each one would determine for himself what was the value of the prospective benefit to be enjoyed, and would make his offer for the money to be loaned, according to his estimate of the worth of the shares which he was allowed to take and of which he became an owner. He could not have more than fifteen shares in the whole; nor become a borrower of the association except in the proportion of his own to the whole of its stock; art. 13. Upon the close of the whole concern, all the owners of shares were to have their just and equal proportions of the profits acquired. Whether the advantages anticipated will finally be obtained may perhaps be questionable; but since the borrower, under such circumstances, is to have his full proportion of the benefit of all the gain which may be made, he cannot assert that he has contracted to pay, or that the lender has reserved to himself, a usurious rate of interest.

4. After these questions had been severally disposed of by correct rulings of the court in relation to them, and a verdict under its direction had been taken for the plaintiffs for the penalty of the bond, the defendant proposed to go to the jury, that they might determine the amount due on the bond, and offered to prove that since its execution he had made sundry payments upon it. This, upon the objection of the plaintiffs, he was not allowed to do, for the reason that he had set up no such matters in his answer.

In this particular, we think the ruling of the presiding judge was erroneous. In actions brought for breach of the condition of a bond, when it is found, by verdict or otherwise, that there

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has been a breach of it, judgment is to be entered in the common form for the whole penalty; but execution is to issue only for the sum which is then due and payable in equity and good conscience. This sum is to be ascertained by a jury, if either party shall think proper to have the question so decided. Rev. Sts. *c.* 100, §§ 8, 9. That was the claim which was preferred by the defendant, and it should have been allowed. The provisions of the practice act, in reference to the filing of answers to the declaration, were not applicable to this question, nor to this action in the stage of it when the question arose. *St.* 1852, *c.* 312, §§ 12, 18. The defendant had attempted to interpose a defence upon his answer, duly filed in pursuance of the requirements of the statute, and had failed. A verdict was rendered and judgment entered against him. He then sought to have the sum for which execution should issue ascertained by the jury. He had a right to insist upon this, and therefore the evidence of payments upon the bond which he offered to produce should have been received. Its exclusion was just ground of exception.

The conclusion is, that judgment is to be entered on the verdict for the penalty of the bond. All the exceptions other than those in relation to the damages are overruled. In relation to the damages the exceptions are sustained, and the verdict to that extent is set aside, and a new trial is granted as to the amount of damages, that is, as to the sum actually due on the bond, but upon no other question.

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Darwin D. Baxter *vs.* Samuel McIntire.

Upon the trial of a writ of entry to foreclose a mortgage, the defendant cannot object to the introduction in evidence of a bond corresponding to that described in the condition of the mortgage, except in being for a less sum and dated one day later.

A voluntary loan fund association, established before the passage of the *St.* of 1854, *c.* 454, is lawful.

A mortgage made by a member of a voluntary loan fund association to its trustees, before the passage of the *St.* of 1854, *c.* 454, to secure the payment of interest at the rate of six per cent. a year on an advance by the association to him, and of his monthly dues and fines, is valid.

A member of an unincorporated loan fund association, who was also their secretary, made a bond and mortgage to the association in contemplation of a loan of a certain amount, part of which he received; but afterwards repaid that amount, on the suggestion of the association that they could not make so large a loan on the security offered; and executed a new bond for the lesser loan which they were willing to make, and cancelled the first bond. *Held*, that if the association never assented to or ratified the cancelling of the first bond, they might still maintain a writ of entry to foreclose the mortgage.

Writ of entry to foreclose a mortgage of land in Lowell. Plea, the general issue, with a specification of defence that "no such bond as is named in the condition of the mortgage referred to" was ever executed by the defendant, or delivered to the mortgagee, or held by the plaintiff; that if any such bond was made, it was usurious and void, and also that it had been cancelled and satisfied; and that there was no such association existing at the time of the execution of said mortgage, as was named therein.

At the trial in the court of common pleas in Middlesex at September 1856, before *Mellen*, C. J., the plaintiff gave in evidence a mortgage of this land, dated April 24th 1854, made by the defendant to Joshua Merrill and others, trustees of the Merrimac Mutual Loan Fund Association, their successors and assigns, and assigned by said trustees to the plaintiff, the consideration named in which was $1,980, and the condition of which was this:

"Provided however, that if the said Samuel McIntire, or his executors, administrators or assigns, shall pay unto the said association, or to said trustees, or their successors or assigns the sum of thirty three $\frac{90}{100}$ dollars per month until the termination of said

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association, and also all fines which may be charged to him agreeably to the articles of said association; and shall keep all other covenants, promises and agreements made with said association, according to a bond of this date, given by said McIntire to said trustees; and shall in the mean time keep the buildings standing on said premises insured against fire in a sum not less than twelve hundred dollars, for the benefit of said mortgagees, their successors and assigns; and also pay all taxes levied or assessed upon said premises; and shall fully indemnify the said trustees, their successors and assigns, from all loss, costs and damage of every description by reason of the nonfulfilment of any of these conditions; then this deed, as also said obligation, shall be absolutely void to all intents and purposes."

The plaintiff produced a bond from the tenant to said Merrill and others, bearing date one day after the mortgage, and otherwise corresponding with the mortgage, except in being conditioned for the payment of $28.25, instead of $33.90, monthly, (being the bond in suit in *Merrill* v. *McIntire*, *ante*, 157,) and proved its execution and assignment to himself, and that the monthly instalments secured thereby were unpaid, except an amount of $200 or upwards, claimed by the defendant as due him from the association, when the bond was given; and contended that this evidence made out his case.

But the defendant objected that the bond did not correspond in date and amount with that described in the mortgage; that the bond was another and different transaction; and that without farther evidence the plaintiff could not recover. And the court so ruled.

The plaintiff then, in order to prove that said mortgage and bond were parts of the same transaction, and that they were so regarded by the parties, offered evidence tending to show that the "Merrimac Mutual Loan Fund Association" was a joint stock company in Lowell, of which the tenant was one of the original associates, bound together under certain articles of association, (a printed copy of which was put in evidence, and the important parts of which are copied in the margin, *ante*, 158 *& seq.*) and which commenced business about three months before

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the date of this mortgage, and had since become incorporated under the *St.* of 1854, *c.* 454; that the defendant was its first secretary, and on the 24th of April 1854, the day of the date of the mortgage, bid off, under the rules of the association, ten shares of the association, which, with the two shares he already held, would entitle him, under said rules, to receive a loan, secured by real estate, of $1,980, the sum mentioned in the mortgage; that the surveyor of the association reported to the board of directors that the property offered as security was only sufficient security for the sum of $1,650, the sum mentioned in said bond, and that it was approved by the directors as security for that sum only; that the defendant, in anticipation of a more favorable report of the surveyor, and of the property being accepted as security for the larger sum, had executed this mortgage; that, after some negotiation with the directors, the defendant agreed to receive the smaller sum, and executed said bond therefor; and sent this mortgage to be recorded on the 2d of May then next, and, after the same had lain the required time upon record to comply with their rules, received the money therefor, and charged himself therewith on the books of the association; that the whole transaction in loaning the money and making the security was done by the defendant, acting as well for himself as the association, with the exception of fixing the amount, and passing upon the sufficiency of tenant's title to the property offered as security; that it was contrary to the articles of the association to loan money, except to members and upon real estate security; that this bond was executed at the same time as the mortgage, and was the only bond or other personal security given by the defendant secured by this mortgage; that the defendant had said that this mortgage was given to secure this bond, and afterwards credited himself with payments on the books of the company as the proper monthly payments thus secured, and kept said bond and mortgage amongst the securities of the association as the only securities for said loan, until he resigned his office, and then delivered them, with the other securities, to his successor.

The court ruled that parol evidence could not be introduced

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to change the express words of the bond or of the mortgage, or to reconcile their conflicting dates and amounts, or to show that this mortgage was given to secure the bond; and that the proof offered would not sustain this suit.

A verdict was returned for the defendant, and the plaintiff alleged exceptions, which were argued and decided at Boston in February 1857.

B. F. Butler & N. St. J. Green, for the plaintiff.

T. Wentworth & R. B. Caverly, for the defendant.

Dewey, J. The question is as to the right of the plaintiff to maintain his action to foreclose a mortgage, and to have a conditional judgment entered thereon.

On the part of the defendant it is alleged that no such bond, either corresponding in date or amount as is set forth in the mortgage deed, is outstanding; and that the bond now produced in the penal sum of sixteen hundred and fifty dollars, under the date of April 25, 1854, is not secured by this mortgage.

If it be competent to introduce parol evidence to show the real nature of the transactions between the parties, and to explain this supposed variance, it might be shown that the bond now produced was the bond intended to be secured by the parties, and was substituted, in lieu of that described, by the mutual consent of the parties, as the bond taken on the actual delivery and acceptance of the mortgage deed.

But it is objected by the defendant that all parol evidence upon this subject must be excluded, and that we can only recur to the condition in the deed itself to ascertain what demands are secured by the mortgage.

To some extent certainly parol evidence may be properly resorted to, for the purpose of showing whether the demand exhibited was really the subject of the mortgage. Very considerable latitude has been allowed in admitting evidence to show that the securities offered at the trial were really substitutes for those described in the mortgage; and thus they have been held to be secured by the mortgage, though not corresponding with the liabilities described in the mortgage. The present question arises however under a somewhat different aspect, and

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if the mortgage deed had only recited a bond for the sum of nineteen hundred and eighty dollars as the condition of the mortgage, it might have required more consideration whether that description could be applied to a bond for sixteen hundred and fifty. The case of *Hall* v. *Tufts*, 18 Pick. 455, would seem to furnish some authority for such evidence in that case.

But in the view we have taken of this case the condition of this mortgage is such, that it is quite as important for the defendant to avail himself of this parol evidence, as it is for the plaintiff. The plaintiff holds a mortgage deed, subject to be defeated if the defendant shall pay to the mortgagees, the trustees of the Mutual Loan Fund Association, "the sum of thirty three $\frac{90}{100}$ dollars per month until the termination of said association, and also all fines which may be charged to him agreeably to the articles of said association, and shall keep all other covenants, promises and agreements made with said association, according to a bond of this date," &c.

If we exclude all parol evidence, the mortgagor is bound to pay to the holder of the mortgage the sum of thirty three dollars and ninety cents per month, a sum larger than the plaintiff now claims, or than could be due to him, giving effect to the parol evidence. The only effect of the evidence being to show a smaller liability under the mortgage, and to explain why the plaintiff cannot produce a bond corresponding with the description of the bond in the mortgage, we think the defendant cannot object to its introduction. *Exceptions sustained.*

At the new trial in the court of common pleas at September term 1857, before *Morris*, J., the plaintiff's attorney read in evidence the mortgage and the assignment thereof to the plaintiff; and rested his case.

The defendant contended that the mortgage was never delivered, and that if it ever had been delivered it was of no validity, because the bond therein described had been cancelled. And the defendant testified that he was secretary of said association from January to June 1854; that when the mortgage was signed he gave a bond in the penal sum of $1,980, such as was

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described in the mortgage; that the bond was retained in his office, where the business of the association was usually transacted, and he sent the mortgage to the registry to be recorded; that he signed these papers in consideration of the receipt of $1,000 out of the funds of the association, by the check of Merrill, who was president of the association as well as a trustee; that on the 25th of April 1854 Merrill, and Manahan, the surveyor of the association, requested him to give up the $1,000, saying that the association would not be satisfied in granting him so large a loan, and that it was understood that he bid off ten shares only; and that on the next day he paid back $800, and agreed to return the balance of $200, which he had used; that on the 6th of May 1854 he received from the association the amount of $1,650, less said $200, and executed a new bond in the penal sum of $1,650 to the trustees of the association, and then, or soon afterwards, destroyed the bond first named, as he thought he had the right to do.

It appeared by the books of the association that on the 2d of May 1854 the association voted, "that the finance committee attend to the papers of the secretary in regard to his loan, and that the money be advanced on shares purchased, when the papers are ready."

The articles of association were introduced in evidence. See *ante*, 158 *& seq., note.* It also appeared that in January 1854 the association became incorporated under the *St.* of 1854, *c.* 454; and that the assignment of the mortgage to the plaintiff was after that date.

Merrill was called as a witness for the plaintiff, and testified that there never was but one loan to the defendant by the association; that he never authorized or had anything to do with a loan of $1,650 upon the defendant's bond, but that on the defendant's representation that a vote had been passed that he should receive the loan of $1,980, he as president gave him a check for $1,000, by which he obtained that amount; that afterwards, being informed that there was some misunderstanding about it, he called on the defendant and requested him to pay back the money; which, after some hesitation, the defendant

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agreed to do, and paid back $800 of it; that the witness never consented to the cancelling or discharge of the bond, nor did anything to or with the papers, and did not suppose they were completed, and could not say that he ever saw them; and that he had brought a suit on the bond of $1,650, dated April 24th 1854.

Manahan was also called as a witness, and testified that on the 31st of March 1854 he made, for the association, a survey of the land described in the mortgage, and reported it good to the amount of ten shares ($1,650), but did not report it good for twelve shares ($1,980); that he had nothing to do with the loan to McIntire, and had no authority to act in making a loan, and knew nothing about the papers at the time they were made.

It appeared by the books of the bank that the defendant received the $1,000 out of the funds of the association on the 22d of April 1854, and returned $800 thereof on the 26th of said April, and received $1,450 on the 6th of May 1854.

The plaintiff introduced evidence tending to show that the loan was made to the defendant, and the money finally received by him, upon the bond of $1,980, and not upon that of $1,650, and that the defendant was never authorized to cancel the bond of $1,980.

The defendant requested the court to instruct the jury as follows:

"1st. That if the plaintiff brought this suit for the Merrimac Mutual Loan Fund Association for their benefit, and did not pay anything for the mortgage, said association should be regarded by them as the party plaintiffs in interest.

"2d. That said association, under its by-laws, was an illegal organization, and that it was not competent for them to make such a contract as the mortgage in suit, in the name of trustees or otherwise, and that the mortgage, for this reason, could have no validity.

"3d. That if there was no delivery of the mortgage in suit as a conveyance by the defendant to the association, they should, on this ground, find for the defendant.

"4th. That said mortgage is invalid, upon the ground that the provisions and conditions therein contained are against law.

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"5th. That if $1,000 was taken from the funds of the association on the 22d of April 1854, by the defendant, as a part of a contemplated loan to him, and as a part of the consideration for the deed of the 24th of that month, and if he afterwards, on the 26th of said April, was induced by the president of the association to pay back to the association $800, and the balance of $200 on the 6th of May, it was a payment of the mortgage, unless the parties had agreed that it should not be a payment.

"6th. That if the money was paid back as appears by the records of the bank, the defendant had the right, in the absence of any agreement to the contrary, to cancel the bond corresponding with the mortgage; and that if he did cancel said bond, the delivery of the money and the destruction of the bond were a payment of the mortgage, and rendered it void, if it ever had any validity."

The court gave the first and third instructions prayed for; and refused the second and fourth prayers for instructions; and as to the fifth and sixth, instructed the jury "that it was for them to decide whether the loan was in fact made to the defendant, and the money finally received by him, upon the bond of $1,980, or upon that of $1,650; that if made and received upon the former, and that bond had been legally and rightfully discharged, this action could not be maintained; that the cancellation of said bond by the defendant would be ineffectual, unless previously authorized by the association or by the trustees, or subsequently ratified by them;" and left it to the jury to determine upon the whole evidence, whether either the association or the trustees had previously authorized such cancellation or subsequently ratified it.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions, which were argued in Boston in February 1859.

Caverly, for the defendant, in support of the second and fourth prayers for instructions, cited *Farrar* v. *Barton*, 5 Mass. 395; *Wheeler* v. *Russell*, 17 Mass. 258; *Carleton* v. *Whitcher*, 5 N. H. 196; *Hinds* v. *Chamberlin*, 6 N. H. 225.

Butler & W. P. Webster, for the plaintiff

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Merrick, J. Under proper instructions from the court the jury have found that the loan to the defendant was made upon his bond for $1,980, which is referred to and described in the mortgage; and that this bond was never discharged by the obligees, nor cancelled in conformity to any authority previously given or any assumed authority subsequently ratified by them or by any party in interest. And it has been determined by the court that if the bond for $1,650 was subsequently taken by the obligees as a substitute for the former bond for $1,980, the production and proof of it by the plaintiff is sufficient, if no other defence is shown, to enable him to maintain his action.

No reason, certainly no adequate reason, is shown for declaring that the mortgagees were incompetent to take the mortgage, or to make the contract for which it was received by them as collateral security. Voluntary associations, similar to that of which the mortgagees were the alleged trustees, have been recognized by the legislature as parties to be regarded with favor; and they have been expressly authorized to take to themselves the powers and privileges of bodies corporate, for the more convenient transaction of the business in which they are engaged. *St.* 1854, *c.* 454, § 5. *Merrill* v. *McIntire*, *ante*, 157.

As the instructions which were given to the jury were correct, and well adapted to the questions of fact which arose at the trial, the defendant has no just cause of exception to the proceedings, because the precise rulings asked for were not made. It is sufficient that the substance of them was fully embraced in the instructions actually given.

Nothing therefore remains but that conditional judgment for possession be rendered for the plaintiff. Upon failure of the defendant to pay, within the time prescribed by the statute, the sum still due, for which the mortgage stands as security, the plaintiff will be entitled to have his writ of possession. The sum which is actually due is of course to be ascertained in a proper manner, before the conditional judgment is entered.

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Berkshire Mutual Fire Insurance Company *vs.* Franklin Sturgis & another.

In an action of tort, brought by an insurance company, alleging that the defendant, after obtaining insurance from them, conveyed away the insured premises, and, upon a subsequent loss, falsely and fraudulently represented that he still had an interest in the premises, and thereby induced the company to pay him the amount of the loss, the jury were instructed that if the defendant, knowing that he had no title, concealed that fact from the company, and they were thereby induced to pay the money, and would not have paid it had they known the facts, then the money could be recovered back in this action. *Held*, that the defendant was entitled to a new trial.

Action of tort against Franklin Sturgis and Benjamin F. Bosworth. Trial in the court of common pleas in Berkshire, before *Aiken*, J., to whose rulings the defendants alleged exceptions, which were argued at Lenox at September term 1858, and the substance of which is stated in the opinion.

H. L. Dawes & M. Wilcox, for the defendants.

J. D. Colt, for the plaintiffs, cited Ellis on Ins. 99, 102 *note*, Hammond on Ins. 89, 138; Angell on Ins. §§ 172, 175, 176, 189; *Homer* v. *Fish*, 1 Pick. 435; *Kidney* v. *Stoddard*, 7 Met. 252.

Shaw, C. J. This is an action of tort. The plaintiffs set forth, in substance, that they issued a policy of insurance to the defendant Franklin Sturgis, insuring his house and barn in Lee, for the term of seven years; that after said insurance, and before the loss aftermentioned, said Franklin Sturgis, by a deed of quitclaim, conveyed and transferred his estate in the house to Josiah Sturgis, by which all his insurable interest in said house ceased; that afterwards he made a mortgage of the estate to William Sturgis, and that the estate, exclusive of the buildings, was not of so great value as the sum thereby insured; that afterwards the house was destroyed by fire; that the defendant Sturgis, by Benjamin F. Bosworth, his attorney, claimed a loss under said policy, and thereupon received the sum of four hundred and fifty dollars, which the plaintiffs in this action seek to recover back, on the ground that they were induced to pay the same through the misrepresentation and fraud of Franklin Sturgis and of Bosworth, acting as his agent, inasmuch as they

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retained from the plaintiffs the knowledge of said quitclaim deed and of said mortgage. They insisted that by the quitclaim deed the assured ceased to have any insurable interest, and so sustained no damage by the burning of the house; and also that the mortgage rendered the policy void.

The ground taken by the defendants was, that although a deed to Josiah Sturgis was made, it was never delivered, and so constituted no alienation, and did not divest the assured of his property and insurable interest in the house.

This, if true, would be sufficient to rebut the presumption arising from the registration of the deed. Delivery is essential to the operation of a deed, even though recorded. *Maynard* v. *Maynard*, 10 Mass. 456. If delivered after registration, it will be sufficient; but such delivery must be proved. *Harrison* v. *Phillips Academy*, 12 Mass. 456.

In regard to the mortgage, the defendants insisted that the amount for which the house was mortgaged did not exceed the value of the land without the buildings.

By the fifteenth article of the plaintiffs' by-laws, to which the policy is made subject, it is provided that a mortgage of the land upon which any building insured stands shall not be deemed an alienation, if the amount secured by the mortgage does not exceed the value of the land, exclusive of the buildings; so that if this was true, it would not affect the right of the assured to recover.

It does not appear by the bill of exceptions, that any evidence was offered by the plaintiffs, or by the defendants, on the question whether the quitclaim deed to Josiah had been delivered, or whether the mortgage to William exceeded the value of the land; but perhaps, in this action, this is not very material. For, although this evidence would have been very material, on the question whether the assured were entitled, or not, to recover the loss; and perhaps in an action for money had and received, on the ground that they had paid the money through a mistake of fact, when they were not liable to pay; yet, in considering the nature of the present action, and the instructions given, we are of opinion, that whatever may have been the evidence on these

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points, the instructions were erroneous, and the verdict cannot be maintained.

This action is not only, in form, an action of tort; but throughout charges a grossly false representation and wilful fraud, by alleging facts not true, and known to be false, with intent to deceive the plaintiffs, by means whereof the plaintiffs were deceived and induced to pay money which the defendants knew not to be due; and demands damages therefor. Indeed, upon no other ground could there be a pretence for maintaining the action against both defendants. If it were to recover back money paid by mistake, it could not have been brought against both the agent and the principal. If the agent had not accounted for and paid it over to his principal, and it was rightfully demanded back, he might alone be liable. But if the agent had paid it over to his principal, the latter only would be liable. The leading averment is, that, at the time of the destruction of the house by fire, the said Franklin had no interest therein, and sustained no loss thereby; but the defendants falsely represented that said Franklin had suffered damage thereby, and had an interest in said house, which representations were false, and known to be false at that time.

These were the charges put in issue and tried. To maintain the action, it was incumbent on the plaintiffs to prove the fact that such representations were made by both defendants, or by one with the knowledge and authority and in behalf of the other, and then to prove that these representations were false, by showing that the defendant Franklin Sturgis had no interest in the house, and sustained no loss by its being burnt, and thereby wrongfully obtained the payment of the loss not due.

But upon referring to the bill of exceptions, it appears to us that, by the instructions to the jury, the plaintiffs' right to recover was not made to depend either upon proof of such representations, or upon their falsity. The proof offered was, "that Sturgis, by Bosworth, his attorney, claimed of the plaintiffs indemnity for said loss, and thereupon received the sum of four hundred and fifty dollars, which was sought to be recovered back in this action, on the ground that the plaintiffs were

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induced to pay the same, through the fraud of said Sturgis and said Bosworth acting as his agent, inasmuch as they retained from the plaintiffs the knowledge of said quitclaim deed, and of said mortgage." The plaintiffs claim that these acts avoided the policy, and that said Sturgis had no insurable interest at the time of the loss; the defendants at the same time claiming that the said quitclaim deed was never delivered, and that the said Sturgis still remained owner of the house, and that the mortgage did not exceed the value of the land without the buildings.

The jury were instructed "that if the defendant [meaning, we suppose, Sturgis, one of the defendants,] knew he had no title to the premises, or if he knew the premises were mortgaged for more than their value, exclusive of buildings, and, having this knowledge, with the intent and design wrongfully to get their money, when he knew he was not legally entitled to it, concealed it from the company, and they were thereby induced to pay the money, and would not have paid it had they known these facts, then the money could be recovered back in this action; and it was not necessary that the company should have been induced to pay the money by any other artifice of the defendant, except the mere suppression of the knowledge aforesaid, if the disclosure of the same would have prevented the payment of the money."

1. We think this instruction was erroneous. In an action putting in issue a wilful and false representation, it was not left to the jury to find, on the evidence, whether or not the assured had lost his insurable interest, at the time of the loss, either by the quitclaim deed or by the mortgage; if he had not, then the representation, if made, was not false, and the action charging such falsity must fail. It is not enough to say that if it was not false, the defendants could not know it to be false. Both facts, the falsity and the plaintiffs' knowledge of it, were put in issue; and must both be proved, directly and not by implication.

2. In a case charging a direct and false express representation, which is traversed and put in issue, it is not competent for a jury to find the defendants guilty, upon the mere forbearance to communicate a fact; and the instruction to that effect was erro-

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neous. There are cases, undoubtedly, where a concealment or suppression of the knowledge of facts, when one is bound to communicate them in honesty and good faith, will avoid a policy, and draw after it some of the same consequences as a misrepresentation; but when it is charged as a ground of action, not merely avoiding a policy, but making it the foundation of a demand for damages, it must be truly stated in the declaration.

The cases cited in the plaintiffs' brief, we think, are all cases of concealment of facts at the time of entering into the contract. Undoubtedly the law requires the utmost frankness and good faith on the part of the assured, in disclosing all facts within his knowledge, material to the risk, to enable the company to decide whether they will enter into the contract, and more especially to fix the rate of premium. Such cases afford no authority for the present.

3. But the test submitted to the jury had a tendency to mislead them. The direction was, if the jury should believe, that if the facts had been disclosed to the plaintiffs they would not have paid the money, then the jury were to find for the plaintiffs. It may be very possible, and even probable, that if the simple facts of the execution of the quitclaim deed, and of the mortgage, had been disclosed to the company, without regard to the legal effect of these acts, upon the contract of insurance, and although the assured honestly believed that neither of the acts would defeat or impair their legal right to recover the loss claimed, the company might have discovered in them a chance for making a legal defence, and, without further inquiry, refused to pay the money, and left the assured to bring suit.

If the effect of this action could be to place the parties in the same state as before the payment, so as to leave the assured to bring their action, and try the question of the original liability of the company to pay the loss, there would be some color of right to replace the money in the hands of the company and let the assured sue. But this is impossible. The company having paid under a claim of right, they can only now recover the money back, or obtain redress in any form of action, by taking upon themselves to prove that the assured, when they made

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their claim, had no right to recover a loss upon the policy. This would be necessary, had the company brought an action of assumpsit to recover back the money upon the ground of a mistake of fact; and *a fortiori* is it necessary, in an action expressly averring misrepresentation and fraud, and claiming damages therefor.

We are therefore of opinion that for these reasons the verdict must be set aside and a *New trial granted.*

JAMES N. RICHMOND *vs.* GEORGE S. WILLIS.

In defence of an action against a sheriff by a stockholder of a manufacturing corporation, for arresting him on an execution against the corporation, it may be shown that he was a stockholder, although the return on the execution states that he was arrested as "now or formerly an officer of the within named corporation."

A person duly summoned under *St.* 1851, *c.* 315, as a stockholder, in an action against a manufacturing corporation, and defaulted, cannot afterwards deny the existence of the corporation, or his liability to be arrested as a stockholder upon the execution against the corporation.

An execution against a manufacturing corporation, which merely contains a command to take their property, authorizes the officer to take the body of a stockholder who was duly summoned in the action.

In an action against a sheriff for arresting a stockholder on an execution against a manufacturing corporation, the defendant may give in evidence his instructions from the judgment creditor.

ACTION OF TORT against the former sheriff of Berkshire for an arrest of the plaintiff by one of his deputies, upon an execution issued from the court of common pleas on the 19th of June 1855, in favor of Norman Cotton against the Cheshire Iron Works, a manufacturing corporation, in an action in which the plaintiff was summoned as a stockholder in the corporation, and in which both he and the corporation were defaulted.

At the trial in the court of common pleas in Berkshire, before *Mellen*, C. J., the plaintiff proved the arrest; and testified, upon cross-examination, that he had made inquiries respecting the papers and records of the Cheshire Iron Works, but had been unable to find them; and that the former and present clerks of

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that corporation now resided out of the Commonwealth; but he did not testify that he had inquired of either of them for such papers and records. The defendant was then allowed, against the plaintiff's objection, to put in secondary evidence of the existence and organization as a corporation of the Cheshire Iron Works, and of the contents of its records, as well as of the fact that the plaintiff was an officer and stockholder.

The plaintiff, on cross-examination, also testified that, prior to May 1851, he subscribed for shares of the capital stock of the Cheshire Iron Works, and in the following May or June was elected their president; but that on the 3d of October 1851 he resigned his office, and his resignation was accepted, and a successor elected; that at the same time he sold and transferred his shares in the corporation, for which he had never paid anything; and never afterwards had any interest in them nor in the corporation.

The defendant put into the case the execution upon which the plaintiff was arrested, with this return of the officer thereon: "By virtue of this execution, I this day made demand of James N. Richmond for property of the within named corporation to satisfy this execution and payment of the same; said demand being made on said Richmond as an officer of the within named corporation. Also I this day made demand on said Richmond for payment in property as an individual, and as now or formerly an officer of the within named corporation; and being informed by said James N. Richmond, that he had no property in his hands that could be taken on execution, either as an officer or stockholder of said corporation, and said Richmond refusing to pay said execution in property or in money, I have, by direction of the within named Cotton, the creditor, arrested the body of James N. Richmond as now or formerly an officer of the within named corporation."

The defendant was then allowed to give in evidence the instructions of Cotton to the officer, although the plaintiff had waived all suggestion of malice in the officer making the arrest, and objected to this evidence.

The defendant was also permitted, against the plaintiff's

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objection, to show, in justification of the arrest, that the officer arrested the plaintiff as a stockholder in the corporation.

The plaintiff then offered to prove that he was not a stockholder or officer at the time of the rendition of the judgment upon which the execution was issued, nor at the time when the cause of action accrued in the suit in which the judgment was rendered. But the court ruled that the plaintiff, having been summoned in that suit, could not now be permitted to show that he was not a stockholder.

The execution upon which the plaintiff was arrested contained only a command to take the property of the corporation, and none to take the body of the plaintiff or of any officer or stockholder of the corporation. And the plaintiff therefore contended that the defendant was not justified in taking his body. But the court ruled, that under this form of execution the plaintiff could be arrested as an officer or stockholder.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

H. L. Dawes & J. Branning, for the plaintiff. 1. The defendant should not have been permitted to prove by secondary evidence that the plaintiff was a stockholder or officer of the Cheshire Iron Works, without first showing that he had been unable to produce the records or copies of them. *Coffin* v. *Collins*, 17 Maine, 440. *Whitman* v. *Granite Church*, 24 Maine, 236. *North Bank* v. *Abbot*, 13 Pick. 465. *Foster* v. *Mackay*, 7 Met 537. *Thayer* v. *Middlesex Mutual Fire Ins. Co.* 10 Pick. 326. *Boyle* v. *Wiseman*, 10 Exch. 647. *The Queen* v. *Llanfaethly*, 2 El. & Bl. 940.

2. The plaintiff having disclaimed malice in the officer in making the arrest, the instructions of the judgment creditor to the officer who made the arrest were improperly admitted. *Walker* v. *Leighton*, 11 Mass. 140.

3. The officer having stated, in his return upon the execution, that he arrested the plaintiff "as now or formerly an officer of the within named corporation," it is not competent for the defendant to contradict the return of his deputy, or to show that the plaintiff was arrested as a stockholder. *Baker* v. *M'Duffie*

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23 Wend. 289. *Sheldon* v. *Payne*, 3 Seld. 453. *Haynes* v. *Small*, 22 Maine, 14. *Barrett* v. *Copeland*, 18 Verm. 67. *Shotwell* v *Hamblin*, 23 Miss. 156. *Bott* v. *Burnell*, 9 Mass. 98, 99. *Slayton* v. *Chester*, 4 Mass. 478. *Bean* v. *Parker*, 17 Mass. 601. *Lawrence* v. *Pond*, 17 Mass. 433. *Boston* v. *Tileston*, 11 Mass. 468. *Gardner* v. *Hosmer*, 6 Mass. 325. *Weld* v. *Bartlett*, 10 Mass. 470. *Simmons* v. *Bradford*, 15 Mass. 82.

The officer elected to arrest the plaintiff as an officer of the corporation, and the defendant is bound by his election. *Lyman* v. *Lyman*, 11 Mass. 317.

4. The plaintiff should have been permitted to show that he was not an officer or stockholder in the corporation, either when the cause of action accrued, or when the judgment was rendered, upon which execution issued. The liability of officers and stockholders for the debts of a corporation in certain cases depends solely upon statute provisions, which are to be construed strictly. The *St.* of 1851, *c.* 315, does not require a summons to be left with an officer of a corporation. The plaintiff is therefore in no sense a party to the suit against the corporation, and is not estopped to show that he was not an officer or stockholder at any time, so as to render himself liable to arrest on an execution against the corporation. *Gray* v. *Coffin*, 9 Cush. 192. *Denny* v. *Richardson*, 4 Gray, 274. *Thayer* v. *Union Tool Company*, 4 Gray, 75. *Adams* v. *Payne*, 7 Pick. 550. *St.* 1851, *c.* 315.

5. The execution upon which the plaintiff was arrested contained no precept or command authorizing the officer to make the arrest. The arrest was in violation of the 4th amendment of the Constitution of the United States, and of art. 14 of the Declaration of Rights of the Constitution of Massachusetts; and against the policy of *St.* 1851, *c.* 224.

J. D. Colt & J. C. Wolcott, for the defendant.

Dewey, J. The case discloses a liability on the part of the plaintiff to arrest, as a stockholder of the corporation known as the Cheshire Iron Works. As such stockholder, he had been duly summoned in the proceedings in the action against the corporation, agreeably to *St.* 1851, *c.* 315. He had in that suit

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the full opportunity to raise the question of his liability as a member, but did not appear upon such summons. The case shows also a compliance with all the requisitions of the statute, as to a demand; and also the want of any property to be levied upon of any officer of the corporation at the time when the cause of action accrued, or when the judgment was rendered. In this state of the facts, the plaintiff was arrested, as he well might have been, on this execution, being thus liable thereon as a stockholder.

But it is contended, on the part of the plaintiff, that by the return of the officer upon the execution the defendant is excluded from setting up this defence. The return, after reciting that a demand had been made upon the plaintiff, and that he declared that he had no property in his hands that could be taken on execution, either as an officer or stockholder of said corporation, states: "I have arrested the body of James N. Richmond as now or formerly an officer of the within named corporation." The case stated on this return does not state an arrest of an officer of the corporation, who was such at the time when the cause of action accrued, or when the judgment was rendered. It was not the arrest of an officer, within the terms of the statute. The plaintiff might have been an officer at the time of the levy of the execution, though not one at the time of the rendition of the judgment. He might have been "formerly an officer," and yet not one at the time the cause of action accrued. He was not therefore, by the return itself, arrested as an officer liable to arrest under the statute. In the opinion of the court, notwithstanding this informal return, it was competent for the defendant to show that the arrest was well authorized, the defendant being legally liable to such arrest, and that he was in fact arrested as a stockholder liable on the execution.

The ruling of the court, that the plaintiff could not be permitted to show by evidence that in fact he was not a stockholder, but was estopped by the proceedings in the former action, in which he was duly summoned as a stockholder, and failed to appear and make any defence, was correct.

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The same reason renders it unnecessary to consider particularly the question, whether sufficient evidence was introduced that due diligence had been used to obtain the corporation books, to authorize the admission of secondary evidence to prove the organization of the corporation, and that the plaintiff was a member thereof; as this was sufficiently established by the record of the proceedings in the original case of Cotton against the Cheshire Iron Works.

There is no ground for the objection to the form of the execution upon which the plaintiff was arrested, that it did not command the officer to take the body of the plaintiff. The whole proceeding is anomalous, but justified by the statute. *Stedman* v. *Eveleth*, 6 Met. 124.

Upon the execution issued in this form, the judgment creditor had the right to direct the officer in whose hands the execution was placed, to arrest any stockholder who had been duly summoned, and not discharged from liability as a member, in case of a neglect of the officers to pay, and there being found no property of such officers to levy upon. Such instructions to make such levy and arrest were competent evidence in the case, as a part of the proceedings, and in justification of the officer's proceeding against an individual who was by statute made liable upon the execution against the corporation. Prior to the statute of 1851, *c.* 315, and under the Rev. Sts. *c.* 38, § 30, it was held, that in levying such execution the officer must, from the necessity of the case, follow the directions of the creditor, and not those of the precept merely. *Stedman* v. *Eveleth*, 6 Met. 125. The form of the execution is not changed by the *St.* of 1851, *c.* 315, though the right to arrest a stockholder is limited to those who have been summoned in the action against the corporation. It is the right of the creditor to select such individual as he may elect among those stockholders who may be liable, there being no *supersedeas;* and although we perceive no special bearing which such instructions could have had upon the issue raised in the present case, yet we are of opinion that their admission furnishes no sufficient ground for setting aside the verdict.

Exceptions overruled.

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David W. Barnes & another *vs.* Tilly Haynes.

A passage way which extended from a street, along and upon both sides of the dividing line between two lots, and was the only means of access to the back part of either, was used uninterruptedly for twenty years by the owners of both lots, without limit, restriction, interruption or objection, or any claim of right except what might be implied from such use; and no mention of any right of way was made in any of the conveyances of either lot for a much longer time. *Held*, that from such use a grant must be presumed, to the owner of each lot, of an easement in that part of the passage way which was upon the other lot.

Action of tort, praying for relief in equity, for the obstruction of a passage way. The case, which was pending in the county of Hampden, was referred, by agreement of parties, to report the facts; and the referee reported to this court a statement of facts, the material part of which was as follows:

The plaintiffs and the defendant are owners of adjoining lots of land fronting on the west side of Main Street in Springfield. Upon the plaintiffs' lot stands a building, called the Coolidge house; and upon the defendant's a building, known as the Lombard house, stood until 1857. These buildings had stood upon the premises from a date earlier than the recollection of any witness, and remained substantially unchanged from 1812 to 1857. The distance from the Coolidge house to the division line between the two lots is about eight feet at the nearest point, and the distance from the Lombard house to the same line was from twelve to twenty feet. In and before 1812 the two lots extended back to the Connecticut River, a distance of from seventy to one hundred rods. There was no access to the rear of either lot except by means of the space between the two houses. In 1842 the opening of Pynchon Street from Main Street to the river furnished the defendant with another entrance to the rear of the Lombard lot.

The plaintiffs claim a right of way for the owners of their lot in common with the owners of the Lombard lot, over a passage way extending from Main Street along the division line between the two lots, and about equally divided by it, for a distance of

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about thirty six feet, to a post, to which were attached gates opening into each lot. The defendant admits the common use of this passage way, but denies the existence of any legal right of way over his land; and in 1857 he removed the old Lombard house, and erected a brick building, covering the entire width of his lot, disregarding this passage way, and began to dig the cellar and foundations before the date of this writ.

From a period prior to 1812, and beyond the memory of any witness, the owners and occupants of these two lots had made common use of the passage way in question, for all purposes connected with the two lots, and the families residing in each, (who were upon terms of intimacy and frequent familiar intercourse,) more extensively by the occupants of the defendant's lot than by those of the plaintiffs, but by both without limit, restriction or interruption, and without any accompanying claim of right, except such as may be implied from the use as described; and without any question or objection.

Until 1831 there was no gate on Main Street across the passage way, and no fence in front of the space between the two houses; the fences in front of the houses extending only to the corner of each. There was a division fence between the lots, commencing at the post at the rear end of the passage way. About the year 1833 the space between the two houses was inclosed from the street, and a gate placed across the end of the passage way, but by whom it did not appear; the gateway being nearly equally divided between the two lots. This gate generally stood open, and was removed in two or three years. In 1842 or 1843, after the opening of Pynchon street, Otis Lombard, the son of the then owner of the defendant's lot, again hung up the gate, without consultation with or objection from Coolidge, the then owner of the plaintiffs' lot; and kept in order the track which led from the street to the passage way, and filled up and graded the ground on the Lombard lot, within the inclosure, to the division line; and applied to Coolidge for permission to do the same upon his lot across the whole passage way, who replied that he had no objection to his levelling the ground, if he did not obstruct the passage way.

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About the same time Coolidge, having offered his premises for sale, in some discussion with Otis Lombard about the matter, asserted that he had a right of way over the passage, as used, "because he had used it." No material change was made in the rear gateways or the passage way from 1812 to 1857.

The defendant relied upon the fact that the several conveyances of the two lots from 1760 to 1857 contain no mention of a right of way, either as part of the premises granted, or by way of exception from the warranty against incumbrances.

This case was argued at Boston in January 1859.

R. A. Chapman, for the plaintiffs, cited *Corning* v. *Gould*, 16 Wend. 534; *Putnam* v. *Bowker*, 11 Cush. 542; *Binney* v. *Proprietors of Common Lands in Hull*, 5 Pick. 503; *Kilburn* v. *Adams*, 7 Met. 33; *Kent* v. *Waite*, 10 Pick. 138; *Brown* v. *Thissell*, 6 Cush. 257; *Bolivar Manuf. Co.* v. *Neponset Manuf. Co.* 16 Pick. 241; *Barker* v. *Salmon*, 2 Met. 32; *Williams* v. *Nelson*, 23 Pick. 141; *Melvin* v. *Whiting*, 10 Pick. 295; *Ashley* v. *Ashley*, 4 Gray, 197; *Hazard* v. *Robinson*, 3 Mason, 275; Rev. Sts. *c.* 60, §§ 27, 28; *c.* 119, § 14; *Bright* v. *Walker*, 1 Cr., M. & R. 219; *Tickle* v. *Brown*, 4 Ad. & El. 369; *Cowling* v. *Higginson*, 4 M. & W. 255; Gale & Whatley on Easements, *c.* 5, § 3.

G. Ashmun & N. A. Leonard, for the defendant. It is essential that the plaintiffs, in order to establish their claim of a right of way by prescription, should prove affirmatively a continued, uninterrupted and adverse use, for a period of twenty years, under a claim of right, with the acquiesence and knowledge of the owner. *Sargent* v. *Ballard*, 9 Pick. 251. *Hill* v. *Crosby*, 2 Pick. 466. *Arnold* v. *Stevens*, 24 Pick. 106. *Gayetty* v. *Bethune*, 14 Mass. 53. *Thomas* v. *Marshfield*, 13 Pick. 243. *Bachelder* v. *Wakefield*, 8 Cush. 250. *First Parish in Medford* v. *Pratt*, 4 Pick. 222.

That, previously to 1843, the use of this way by both parties was consistent with the theory of the defendant, that is, by mutual indulgence and without any express claim of right, appears from the following facts: (1.) The use was without any accompanying claim of right, except such as may be implied from the line as described, and without objection on the other

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hand. To constitute such a claim, the use must amount to an invasion or abridgment of the defendant's right. *Arnold* v. *Stevens*, 24 Pick. 110. *Kilburn* v. *Adams*, 7 Met. 39. *Dawson* v. *Duke of Norfolk*, 1 Price, 246. *Ewing* v. *Burnet*, 11 Pet. 52. Angell on Adv. Enjoyment, 78. *Rogers* v. *Sawin*, 10 Gray, . (2.) The continuance of the way was advantageous to the occupants of both lots; and when the continuance of the way ceased to be so advantageous, the owners of the Lombard estate closed it up by hanging the gate across it, and exercised a control on their side of the line, inconsistent with any acknowledged right of Coolidge, and without objection on his part. (3.) Coolidge first made claim to the right of way, not by virtue of any grant or contract between the owners of the lots, but "because he had used it." *Sargent* v. *Ballard*, 9 Pick. 251.

The way in question being upon both lots, and the use of it by the adjoining occupants being of the same character, the covenants contained in the deeds of the owners of the respective lots, that their lot is free from incumbrances, explain the nature of this use by both parties, and are of great weight. *Church* v. *Burghardt*, 8 Pick. 327. 1 Greenl. Ev. § 211.

Shaw, C. J. This case comes before us, as upon an agreed statement of facts. The parties, and those under whom they claim respectively, owned estates on the west side of the Main Street in Springfield; each had a dwelling house on the street, and extensive rear lands back of each, extending to Connecticut River, to which neither of them had access except from the Main Street. There was in fact, and in actual use, a passage way, lying between the two houses, from the street to the rear, to a point where each party had a gate leading into his own rear premises, one on the one side, and the other on the other side of the dividing line, by which the fee in the soil of their respective estates was divided; and the track of the passage way, as actually used, lay partly on the one side, and partly on the other side of the same dividing line. This way was used by both parties as a common passage, for all useful purposes, to the rear part of their respective houses, as also to their respective

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open lands, held in severalty, and separated by a similar dividing line. This common use continued, without interruption, until a few years since, when a new public street was opened from the street towards the river on the other side of the premises now of the defendant, by means of which the owners of that estate had a free access to the rear of their house, and to the former open land lying in rear of their house, towards the river. Since that time the defendant has ceased to use the old common passage, and has claimed the right to use that part of his land, over which the track of the old way passed, as a way, and has claimed the right to use it, and has used it, for other purposes, and built upon it, so that the way in its old course can no longer be used by the plaintiffs.

Upon the facts reported, the court are of opinion that, under the circumstances stated, and taken in connection with the deeds under which the parties and their predecessors have respectively held their estates, the use of the common way, by each, so far as it was used in and over the soil of the other, was adverse, uninterrupted and used under a claim of right, and continued more than twenty years, (probably in fact a great many more than twenty,) and thereby each acquired such an easement in that portion of the land of the other, which was covered by the way, as the other could not lawfully disturb.

We think that the antiquity, the distance between and the relative position of their respective dwelling houses, and the open lands in the rear of each, and the obvious convenience and necessity for such a common right of way to their respective rear premises, strengthen the presumption arising from long, adverse and undisturbed use, of a non-appearing grant, by which such a common way was created, partly on the land of each, for their common benefit. And we also think that when a fence was erected against the street, the erection of a gate adapted to the passage of teams and carriages, partly on the land of each of the parties, tends to confirm the same presumption. When such actual, uninterrupted use of a way, as of right, is shown to have existed a sufficient length of time to create the presumption of a grant, if the other party relies on the fact that these

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acts, all or some of them, are permissive, it is incumbent on such party, by sufficient proof, to rebut such presumption of a non-appearing grant; otherwise, the presumption stands as sufficient proof, and establishes the right.

Judgment for the plaintiffs.

LEE SPRAGUE & another *vs.* CITY OF WORCESTER.

In an action of tort against a city for obstructing a stream by the erection of a bridge, to the injury of a mill, evidence that one of the then owners of the mill, at the hearing before the committee of the city council, objected to the construction of the bridge, as likely to obstruct the water, is inadmissible for the plaintiff; although the defendants have been allowed to show, upon cross-examination of the other owner, that he was one of that committee, and approved of the bridge.

An action of tort will not lie against a city for obstructing a stream to the injury of a mill, by the erection of a bridge, if the bridge is suitably constructed so as to let the water pass off with reasonable freedom, at all times, except in case of extraordinary freshets not occurring annually.

ACTION OF TORT for the obstruction of the water in Blackstone River, and setting it back upon the plaintiffs' mill, by the erection of a new bridge, in repairing the highway from Millbury to Worcester.

At the trial in the court of common pleas in Worcester, before *Briggs*, J., Josiah G. Perry, who, jointly with his brother Dexter, was owner of the mill when the new bridge was built, was examined as a witness by the plaintiffs. Upon his cross-examination, the defendants were allowed, against the plaintiffs' objection, to prove that he was one of a committee appointed by the city council to contract for the construction of the new bridge; and to ask him whether he did not sign the contract, whether he did not petition for the bridge, and whether he did not express a preference for a bridge of two rather than of three arches.

The plaintiffs then offered to prove by Dexter Perry that he objected, to the committee, that he did not think there would be

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room enough for the water to pass under the bridge proposed by them, and that he did this more than once. To this evidence the defendants objected; but the court admitted it.

The defendants requested the court to instruct the jury, "that if the bridge erected by the defendants was a reasonable and proper structure, and reasonable care was taken in its construction, and nothing was done negligently, wantonly or carelessly to cause damage to the plaintiffs, and damage was not caused except in extraordinary freshets for unimportant periods of time, the plaintiffs were not entitled to recover."

The presiding judge declined to give this instruction; and instructed the jury, "that if they believed that the width of the space for the passage of the water under the new bridge was materially diminished from what it was under the old bridge; and if they were satisfied, from the evidence before them, that the bridge could have been so constructed that the width of the space for the passage of the water would not have been so diminished, and that the effect of the construction of the new bridge has been, that when there has been a great flow of water, caused by rain, or the breaking up of winter, to obstruct the free and accustomed flow of the water and the passage of ice, and to set the water back upon the plaintiffs' mill, and thereby for a time to prevent the use of said mills by the plaintiffs, or to occasion other damage as set forth in their declaration, the plaintiffs would be entitled to recover."

The jury returned a verdict for the plaintiffs, and the defend ants alleged exceptions, which were argued at Worcester at October term 1858.

C. Devens, Jr. & G. F. Hoar, for the defendants, upon the instructions requested and given, cited *Mellen* v. *Western Railroad*, 4 Gray, 301; *Rowe* v. *Granite Bridge*, 21 Pick. 348; *Dodge* v. *County Commissioners*, 3 Met. 383; *China* v. *Southwick*, 3 Fairf. 238; Angell on Watercourses, § 347.

P. C. Bacon & P. E. Aldrich, for the plaintiffs, cited *Perry* v. *Worcester*, 6 Gray, 544; *Drake* v. *Curtis*, 1 Cush. 395.

Shaw, C. J. This is an action of tort, in the nature of a common law action on the case, for damages to the plaintiffs'

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real estate by the city of Worcester, by erecting a bridge on a public highway over a watercourse, in such manner as to obstruct the flow of water, occasionally set it back on the plaintiffs' mill, and thereby cause damage.

The principles on which such an action can alone be maintained were fully stated in the case of *Perry* v. *Worcester*, 6 Gray, 544. We suppose, from the names, that the bridge and mill mentioned in that case are the same with those in the present. The rule stated in that case, we think, is well established by authorities. In providing thus for a public easement, it is the right of the public, by their duly constituted agents — in such a case as this, by the city — to erect the bridge, whether it take a man's land, or do other damage to his property or not, under the right of eminent domain. By any such taking, or other damage done to private property, the city and its agents are not wrongdoers, and no action, as for a wrong done, will lie against the corporation or its officers; the party damnified must seek his compensation, and is entitled to a complete indemnity, in the manner provided by the Constitution and laws. This extends to all damage; not only to that arising from the taking, but to all other damage incident to or consequent upon the erection and making of such highway or bridge.

This presupposes that the public work will be so constructed as to cause no unnecessary damage; if, therefore, for want of reasonable care and skill in the construction of such work, unnecessary damage is caused, it is not warranted by the right of eminent domain, and therefore the corporation or its agents are responsible for it. Such damage, however, must be real, substantial and appreciable, and not merely theoretical or slight, or such as may be caused by an unusual or extraordinary swell of the waters.

In coming to the exceptions, the court are of opinion that the testimony of Dexter Perry, an owner of the mill at the time of the erection of the bridge, was not competent. It was but the expression of an opinion to the committee for building the bridge, of whom his brother and co-proprietor was one. It was but the opinion of one person, before the bridge was built

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without a suggestion that he had any knowledge, or any skill or experience. It was not warranted by the fact that his co-proprietor had been asked certain questions on cross-examination.

But the material ground upon which the court are of opinion that the verdict cannot be supported is, that the directions of the judge were defective, and not adapted with sufficient precision to the case.

The defendants requested the court to instruct the jury, that "if the bridge was a reasonable and proper structure, and reasonable care was taken in its construction, and nothing was done negligently, wantonly or carelessly to cause damage to the plaintiffs, and damage was not caused except in extraordinary freshets for unimportant periods of time, the plaintiffs were not entitled to recover."

By "a reasonable and proper structure" we understand a bridge of suitable width of water way, and otherwise so arranged as to carry off the water with reasonable freedom, as well when broken ice was passing off with it, as at other times, and also when the stream was swelled with its ordinary annual increase at the breaking up of winter; and by the exception of "extraordinary freshets for unimportant periods of time" we consider was meant freshets not ordinarily occurring annually, but which come occasionally. If such was the intention of the prayer of the plaintiffs for instruction, and it was so explained and understood, we think the instruction ought to have been given. Bridges are not required to be so built as to secure all private proprietors of mills or lands from all possible damage from extraordinary causes; but to be so reasonably constructed as to secure private proprietors from damage from the ordinary action of the elements, including in such ordinary action water in its high and low annual stages, open or frozen, or carrying off floating ice.

The court declined to give this instruction; but did instruct the jury, that if they believed that the width of the space for the passage of water under the new bridge was materially diminished from what it was under the old bridge, and if satis-

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fied, from the evidence, that the bridge could have been so constructed that this width would not have been diminished, and that the effect had been, that when there has been a great flow of water caused by rain, or the breaking up of winter, to obstruct the free and accustomed flow of the water and the passage of the ice, and set the water back upon the plaintiffs' mills, and thereby for a time to prevent the use of said mills, or to occasion other damage, as set forth, the plaintiffs would be entitled to recover.

This instruction, taken in connection with the refusal to give the instruction substantially as prayed for, was defective and erroneous. The test prescribed was erroneous — the width of water way under the old bridge. That was of wood, supported on piles, and may have been three or four times as broad as necessary. Whereas all the defendants were bound to do was to build a bridge with a water way reasonably sufficient to carry off the water, in its ordinary and usual condition, at all seasons of the year.

Again; "if the bridge could have been so constructed that this width would not have been diminished." This instruction was given without any qualification in regard to expense. No doubt a lofty bridge might have been erected at great expense, without touching the water; but if such a structure would subject the corporation to an unreasonable expense, it could not be required.

So if, by means of the bridge, the water was set back "for a time," so as to prevent the use of the mills, or occasion other damage. The jury would be bound, under this instruction, to find for the plaintiffs, if the water was set back by an unusual and extraordinary flood, and for any time, however short.

For the reasons already given, we are of opinion that these instructions were defective and incorrect, founded upon a mistaken view of the duties of towns and cities in the construction of highways and bridges, such as would impose an unreasonable burden upon them, and not necessary to the reasonable security of private rights. *Exceptions sustained.*

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HENRY A. JOHNSON *vs.* HENRY PHILLIPS & another.

A mortgagee may maintain a writ of entry against a subsequent purchaser of the equity of the redemption, who has conveyed it away again, but still remains in possession; and may recover judgment for possession.

WRIT OF ENTRY to foreclose a mortgage. The parties submitted to the decision of the court of common pleas this case:

The premises, after being mortgaged by Levi Johnson, the owner thereof, to the plaintiff, were conveyed to Henry Phillips, by warranty deed, upon condition that he should pay the mortgage, and save the grantor harmless therefrom; and were conveyed away by Phillips, before this action was commenced, to William Durant, and from him, by mesne conveyances, to Albert Lamb, who has since remained the owner of the equity of redemption, and has been summoned in and made a defendant in this action. Phillips has been in possession and occupation of the premises ever since the conveyance from Levi Johnson to him; and the plaintiff, before bringing this action, demanded of him payment of the sum due on the mortgage, or a surrender of possession of the premises, both of which he refused.

The court of common pleas gave judgment for the plaintiff, and Phillips appealed to this court, before whom the case was argued at Worcester at September term 1858.

C. H. Merriam, for the plaintiff.

J. W. Fletcher, for Phillips.

SHAW, C. J. The plaintiff brought his action in the usual form of a writ of entry, counting on a title in fee and in mortgage; and had such title under a mortgage from Levi Johnson, the owner, being prior, in time and in right, to any title claimed by the defendant. The plaintiff having such title, and declaring on it, the obvious purpose was to obtain a foreclosure of the mortgage, and therefore there is no doubt that the court of common pleas had jurisdiction. The plaintiff having the prior title as mortgagee, the defendant, being the tenant in possession, could have no higher or better title than that of holder of the equity of redemption; and the most favorable presumption for

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him, which the plaintiff could make, was that he had acquired such equity and so was rightfully made defendant in the action.

But it is contended upon the facts, that although the defendant had at one time been the owner of the equity, yet that he had alienated his entire interest and estate in the premises, and was therefore not tenant to the freehold. But it further appears that the plaintiff, having a right of entry as mortgagee, demanded possession of the defendant, who refused to yield it. The defendant, having thus resisted the plaintiff's right of entry, could not qualify his own wrong, and insist that such adverse possession was less than a disseisin. It was a disseisin as against the plaintiff; he thus became technically seised by disseisin, and so tenant to the freehold, as against him, and the writ of entry was rightfully brought against him. If his notice of non-tenure under the general issue of nul disseisin would, in our present practice, have operated as a plea of non-tenure in bar, such proof of disseisin would have falsified the plea. *Dolby* v. *Miller*, 2 Gray, 135.

It thus appearing by the facts that the defendant is not the holder of the equity of redemption, but a mere stranger, so that a conditional judgment against him would be irregular and inapplicable, then we think the plaintiff, by the Rev. Sts. *c.* 107, may have a general judgment for his seisin and possession; after thus obtaining his seisin and possession he may give notice in writing to any person entitled to redeem, that he will thenceforth hold for condition broken, from which time the term of three years will commence, and if not redeemed within that time, he will hold the estate foreclosed.

If it be objected that because it turns out that the ordinary conditional judgment, as in case of a mortgage, cannot be entered, therefore the court of common pleas had no jurisdiction; the answer is, that the jurisdiction of that court having once attached, it is competent for that court to render any such judgment as the case requires; and further, that by law such general judgment is one, and a very efficient step towards the foreclosure of a mortgage, and of such case that court has jurisdiction. *Judgment of the court of common pleas affirmed.*

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John Hadley *vs.* Joseph Peabody & Trustees.

A city cannot be charged as trustee of a teacher of a public school, paid by a quarterly salary, upon a process of foreign attachment served in the middle of a quarter.

Shaw, C. J. The question in this case arises on the trustees' answer. The record appears slightly confused; but the only question, decided first by the police court, then by the court of common pleas, and which has been argued before us is, whether the City of Lowell are chargeable as trustees on these facts: The principal defendant was a teacher in one of the public schools of the city, for the term of one year, at a salary of $1,000, payable quarterly. The service of this process was made about the middle of a quarter. The plaintiff contends that the city must be charged for the part of a quarter's salary, proportioned to that part of the time which had elapsed at the time, since the beginning of the quarter. The police court and the court of common pleas decided against this claim, and this court are of opinion that their judgment was correct.

It was not a debt, and might not become a debt; the contract was entire, and until completed on the part of the teacher nothing was due. We think this point is settled by authorities. *Brackett* v. *Blake*, 7 Met. 335. *Robinson* v. *Hall*, 3 Met. 301. *Daily* v. *Jordan*, 2 Cush. 390. *Osborne* v. *Jordan*, 3 Gray, 277

Trustees discharged.

H. G. Blaisdell, for the plaintiff, cited Rev. Sts. *c.* 109, §§ 30, 34; *Thorndike* v. *De Wolf*, 6 Pick. 120; *Osborne* v. *Jordan*, 3 Gray, 277; *Brackett* v. *Blake*, 7 Met. 337; *Davis* v. *Ham*, 3 Mass. 33; *Frothingham* v. *Haley*, 3 Mass. 68; *Willard* v. *Sheafe*, 4 Mass. 235; *Robinson* v. *Hall*, 3 Met. 301.

A. R. Brown, for the trustees.

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Samuel Cloon *vs.* Elbridge Gerry.

In an action for malicious prosecution, when the facts are not controverted, the question whether they constitute probable cause for the prosecution is for the court.

A conviction by a justice of the peace, in a case within his jurisdiction, is sufficient evidence of probable cause, to defeat an action for malicious prosecution.

Action of tort for malicious prosecution. The declaration alleged that the defendant, maliciously contriving to injure the plaintiff, and without probable cause, made a complaint to a justice of the peace against the plaintiff, for illegal sales of intoxicating liquors; and that the plaintiff, being tried before the justice, was convicted and sentenced, and appealed to the court of common pleas, and was there tried and acquitted.

At the trial in the court of common pleas in Middlesex, before *Sanger*, J., after the reading of the pleadings, "it being admitted that the complaint before the magistrate was for single sales of intoxicating liquors under *St.* 1855, *c.* 215; and that the defendant was not a witness at either trial; upon motion of the defendant, and after argument, the court ruled that the action could not be maintained."

The plaintiff became nonsuit, and alleged exceptions, which were argued at Boston in February 1859.

H. G. Blaisdell, for the plaintiff, cited *Bacon* v. *Towne*, 4 Cush. 217; *Burt* v. *Place*, 4 Wend. 591; *Parker* v. *Farley*, 10 Cush. 279; *Mead* v. *Boston*, 3 Cush. 404; *Weaver* v. *Townsend*, 14 Wend. 192; *Goodrich* v. *Warner*, 21 Conn. 432.

J. P. Converse, for the defendant, cited 1 Greenl. Ev. § 78; 2 Greenl. Ev. § 454; *Ulmer* v. *Leland*, 1 Greenl. 135; *Foshay* v *Ferguson*, 2 Denio, 617; *Munns* v. *Dupont*, 3 Wash. C. C. 31; *Griffis* v. *Sellars*, 2 Dev. & Bat. 492; *Parker* v. *Farley*, 10 Cush 279; *Whitney* v. *Peckham*, 15 Mass. 243; *Reynolds* v. *Kennedy*, 1 Wils. 232; *Herman* v. *Brookerhoof*, 8 Watts, 240; *Witham* v. *Gowen*, 14 Maine, 362; *Payson* v. *Caswell*, 22 Maine, 212.

Shaw, C. J. In an action for a malicious prosecution against one, in the name of the Commonwealth, the averment on the

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part of the plaintiff, that the complaint was made without reasonable cause, lies at the foundation of the suit; and although it is in form a negative proposition, it is incumbent on the plaintiff to establish it by satisfactory proof. This kind of suit, by which the complainant in a criminal prosecution is made liable to an action for damages, at the suit of the person complained of, is not to be favored; it has a tendency to deter men who know of breaches of the law, from prosecuting offenders, thereby endangering the order and peace of the community. Absence of probable cause is essential; from want of probable cause, malice may be inferred; but from malice, even if express, want of probable cause cannot be inferred.

An ultimate acquittal of the offence charged, though necessary to be proved, is but a short step towards the maintenance of an action for malicious prosecution. Malice, and absence of any reasonable and probable cause, must also concur with an acquittal.

In the present case, the prosecution complained of was a complaint before a justice of the peace by whom the plaintiff was convicted; from this judgment he appealed, and on trial in the court of common pleas was acquitted.

On the trial, it appeared from the pleadings and evidence, and was admitted, that the complaint was for an offence which the magistrate had, by law, jurisdiction to hear, decide and render a judgment in; also, that neither in the trial before the magistrate, nor in the trial in the common pleas, was the defendant a witness. On this case, the court ruled that such a conviction was proof of probable cause; or, to state the proposition with more precision, it negatived the plaintiff's leading and essential averment that the complaint was made without reasonable and probable cause, and that, for this reason, the action could not be maintained, and thereupon ordered a nonsuit.

The court are of opinion that this direction was right. The question of reasonable and probable cause, when the facts are not contested, is a question of law. And when the plaintiff had been convicted by a tribunal, constituted by law, with authority to render a judgment, which, if not appealed from, would have

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been conclusive of his guilt, and such judgment is not impeached on the ground of fraud, conspiracy or subornation in its procurement, although afterwards reversed on another trial, it constitutes sufficient proof that the prosecution was not groundless, and to defeat an action for malicious prosecution. The case of *Whitney* v. *Peckham*, 15 Mass. 243, is directly in point, and we think it is well sustained by authorities.

It is said that the question of probable cause is a mixed question of law and fact, and that the facts should have been left to the jury. Here no fact material to the question was controverted, and then there was nothing to leave to a jury.

Exceptions overruled.

WILLIAM L. WHITNEY & others *vs.* LYMAN WILLARD.

A mortgagee of personal property, from whom, after a foreclosure of the mortgage and a sale of the property, the assignee in insolvency of the mortgagor has recovered its value by suit upon the ground that the mortgage was fraudulent, may maintain an action against the debtor on the mortgage debt.

Under the *St.* of 1844, *c.* 178, § 5, as under the previous insolvent laws, a certificate of discharge, obtained upon second proceedings in insolvency, is no bar to an action upon a debt which might have been proved under the first proceedings, and was not proved under the second proceedings.

ACTION OF CONTRACT on three promissory notes made in August 1850, and payable in October, November and December respectively. The case, which was pending in Middlesex, was submitted to the decision of the court, and argued at Boston in February 1859, upon these facts:

The notes were given by the defendant to the plaintiffs in payment for furniture sold by them to him, and were secured by mortgage of the furniture, duly recorded. Upon a failure to pay the first note, the plaintiffs foreclosed the mortgage and sold the furniture.

In September 1850 the defendant applied for the benefit of the insolvent laws, and his assignees in insolvency afterwards sued the plaintiffs and recovered judgment against them for the value of this furniture, as constituting part of the defendant's

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estate, and they were compelled to satisfy that judgment. The defendant failed to obtain his discharge under said proceedings in insolvency.

In December 1853 the defendant again instituted proceedings in insolvency, and obtained a certificate of discharge in the ordinary form, by the assent in writing of three fourths of his creditors who had proved their debts.

The notes in suit were provable under each of the proceedings in insolvency, but were not proved under either.

B. W. Whitney, for the plaintiffs.

B. F. Butler, for the defendant.

Shaw, C. J. Action on several promissory notes made by the defendant, payable to the plaintiffs. The defence is placed on two grounds: first, payment in whole or in part by the proceeds of a chattel mortgage foreclosed, given to secure the same notes; second, a discharge in insolvency.

1. On the first ground of defence, the facts agreed are, that the defendant did give the plaintiffs a mortgage on a large amount of furniture, and that, some time after giving such notes and mortgage, the defendant went into insolvency, but obtained no discharge under it. The assignees brought an action against these plaintiffs, to recover the said furniture, on the ground that the mortgage was given as a preference, or otherwise in fraud of his creditors, and they recovered of the plaintiffs the full value of such property.

The court are of opinion that such mortgage did not operate to discharge or otherwise affect the notes, as between these parties. The general rule of law is, that when personal property is consigned or mortgaged, with a power in the consignee or mortgagee, in law or by force of the contract, to sell the mortgaged property if not redeemed, and apply the proceeds to the payment of the debt, it does not enure by way of actual payment, until the property is sold and the money realized, or the mortgage foreclosed and the mortgaged goods become the absolute property of the mortgagee. *Rice* v. *Catlin*, 14 Pick 221.

It follows, as a necessary legal consequence, that until it is thus realized in money, or foreclosed, it does not preclude the

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holders from bringing an action on the personal contract, to which the mortgage was collateral.

Another consequence is, that if the right of the mortgagee is defeated by a title paramount, so that the mortgagee receives no benefit from it, no payment is made on account of the notes, nor is their efficacy impaired as between promisor and promisee. This of course is taken with the qualification, that the title under which it is claimed and recovered, is a good, valid, paramount title, and that the property is not given up through the fault or connivance of the promisees.

If it be said that the plaintiffs cannot set up this excuse for not applying the mortgaged goods, because, if the assignees recovered them, it was in consequence of the plaintiffs' own fraud, it may be said in return, that this answer not only comes with an ill grace, but also with no legal effect from this defendant. If it was defeated as being fraudulent against creditors, it was a fraud in which the defendant had his full share. The title of the creditors, represented by the assignees, was paramount, both to that of the defendant and to the plaintiffs', because both joined in the fraud to the injury of creditors. The mortgage was valid as between mortgagor and mortgagee. Besides, it actually went to the use of the defendant, by satisfying *pro tanto* his other creditors, who by law had a right so to obtain and apply it.

The mortgaged property having thus been taken away by a title paramount to both these parties, and without any default of the plaintiffs, other than one for which the defendant was equally and jointly responsible, we think the notes stand as valid contracts between the parties, as simple contract debts, in the same condition as if no collateral security had been given.

2. On the second ground, the court are of opinion that the discharge of the defendant, under a second proceeding in insolvency, is no bar to the plaintiffs' action. This debt existed at the time the first insolvency proceedings were commenced. They did not prove their debt, nor did the defendant obtain a certificate of discharge; perhaps, as the counsel for the defend-

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ant suggests, in consequence of this very attempt of the parties to give and obtain an illegal preference.

Under the second proceeding in insolvency, the plaintiffs did not prove their debt. The case, we think, is clearly within the authority of *Gilbert* v. *Hebard*, 8 Met. 129. That case underwent great consideration; and the principle on which it was decided was adopted as a necessary practical construction of the insolvent laws as a system.

It is suggested in the argument for the defendant here, that the case is distinguishable from *Gilbert* v. *Hebard*. But we perceive no difference in any particular which makes it applicable to this case. In that, the discharge was refused on application, and again refused on an appeal to this court. But it is immaterial how the insolvent failed to obtain his discharge; the material fact is, that he did fail to obtain his discharge under the first insolvency. In that respect the cases are the same.

Again; it is intimated that that case depended on the law as it stood before the *St.* of 1844, *c.* 178, § 5, which expressly contemplates a second, and even a third insolvency.

It is true that this act contemplates a second and third insolvency. But it does not direct how such a second insolvency shall be instituted, or what property it shall bind. It is therefore not repugnant to the principles stated in the case cited. That did not hold or imply that there might not be a second insolvency, but only that it must be founded upon a debt or debts contracted since the commencement of the former proceedings, and would be binding only upon property since acquired by the debtor, and in no respect affect the assets which passed to the assignees under the first insolvency, and in no way affect creditors under the first insolvency, unless they should come in and make themselves a party to such second insolvency proceedings.

When therefore the legislature speak of a second insolvency, without directing how it shall be instituted, or what property shall be affected by it, we presume they had in view a case where an insolvent has contracted new debts, and acquired property which did not exist and did not pass as assets under the

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former assignment; and did not intend to affect rights previously vested. In this way two distinct proceedings in insolvency may exist against the same insolvent debtor; and such construction is put on the various provisions, constituting one entire system, because such construction is necessary to make the various provisions harmonize with each other, and secure the rights of all parties under them.

These principles were reaffirmed at the last March term in Suffolk, in a case not distinguishable in its circumstances from the present. *Gardner* v. *Way*, 8 Gray, 191 *& seq.*

Judgment for the plaintiffs.

WILBUR WELLS *vs.* JARVIS B. SMITH.

Relief in equity will not be granted against a judgment obtained at law upon a promissory note given solely for the purpose of testing, by a collusive action, whether the maker had any title in property held in trust for his wife.

BILL IN EQUITY, filed in the county of Bristol. The bill alleged that, in 1842, the wife of Wells was possessed of certain personal property, held in trust for her by Daniel Claflin, and that, in order to obtain a legal decision whether Wells had any right or interest in the same, Smith advised Wells to give him a promissory note, upon which Smith would commence an action against Wells, and summon Claflin as his trustee; and assured Wells that he should be put to no expense or trouble about the suit, and need not appear in court to answer to it, and that the note, or the judgment obtained upon it, should never be enforced against Wells, in case he should not succeed in establishing his right to the property; that Wells, relying upon these fraudulent assurances of Smith, and upon no other consideration whatever, gave him a promissory note, upon which Smith commenced a suit, and summoned Claflin as trustee; that Wells made no appearance, and was defaulted, but Claflin appeared, and denied his liability as trustee, and was finally discharged

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by this court at October term 1843 in Bristol; [*Smith* v. *Wells*, 7 Met. 240;] that Smith then informed Wells that "the whole affair was dead," and never would cost or trouble him, and Wells acted upon this assurance; but that Smith fraudulently procured a judgment to be made up against Wells upon the note, and duly recorded, and, without attempting to collect it for fourteen years, or informing Wells thereof, commenced an action thereon in this court on the 8th of July 1856, and attached the real estate of Wells thereon, which suit was now pending; and that Smith threatened to file that judgment in set-off in an action commenced by Wells on the 30th of November 1855 on a promissory note given him by Smith for borrowed money, and now pending in the court of common pleas in Bristol. The bill prayed for an injunction and other relief.

The defendant demurred to the bill, because the plaintiff had a full, complete and adequate remedy at law; and also for want of equity.

The case was argued at Boston in January 1859.

C. I. Reed, for the defendant.

E. H. Bennett, for the plaintiff.

Shaw, C. J. The plaintiff, by his own showing, has no equity. He conspired with the defendant to bring a groundless action, in order to defeat the rights of his wife in certain trust property, under the false pretence that it was liable to attachment by his creditors, when the plaintiff in that action was not a creditor; and the whole of the proceeding was an abuse of legal process, and a fraud on the law.

Bill dismissed.

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Mayo G. Smith *vs.* Euphemia V. Smith.

A decree of divorce *a vinculo*, between parties residing in this state, obtained in another state, for a cause which occurred here and which was not a legal cause of divorce here, and at the suit of a party who went into that state for the purpose of obtaining it, is void by the Rev. Sts. c. 76, § 39, and cannot be set up in defence to a libel for divorce filed by the same party in this state.

Shaw, C. J. This libel for divorce, on the ground of adultery, was commenced at November term 1856 of this court in Essex. At May term 1858 a motion was made, in behalf of the respondent, to dismiss the libel, on the ground that, in May 1857, since the commencement of this libel, the libellant had gone to Indiana, and there commenced a petition for a divorce, and in the year 1858 obtained a decree of divorce, dissolving the bond of matrimony. When this motion was made, the general fact of such divorce was admitted by the libellant; but the motion having been reserved for the full court, a record of the proceedings in Indiana has been obtained and submitted.

From the record, it appears that those proceedings were commenced in the spring of 1857, which must have been soon after the libellant left Massachusetts; that his petition contained a charge of desertion, and a charge of adultery; that notice was ordered and published in one of the local newspapers three weeks successively; that the respondent was defaulted; that a formal appearance was entered for her by a person called the prosecuting attorney — we suppose an officer of the court — in pursuance of some local law or practice; that a trial by jury was waived; that, on a trial by the court, she was found guilty of the desertion, but not guilty of the adultery alleged. The desertion was alleged to have commenced in May 1856, about six months before the date of his libel in this county for adultery. The case has been submitted to us without argument.

Upon these facts, the court are of opinion that the divorce

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thus obtained is not valid in this commonwealth to dissolve the bond of matrimony between these parties, and therefore no ground for dismissing this libel.

The presumption is violent, if not conclusive, that the husband went into Indiana in order to obtain a divorce. Even if he had other objects in view, if this was one — and his acting upon it is strong proof that it was — it would be within the statute. Rev. Sts. *c.* 76, § 39. This provides that, when any inhabitant of this state shall go into any other state or country in order to obtain a divorce for any cause which had occurred here, or which would not authorize a divorce by the laws of this state, a divorce so obtained shall be of no force or effect in this state.

This divorce is obnoxious to both these objections. It was obtained for a cause which had occurred here, whilst the parties resided here; and also for a very short term of desertion, which would not have been a legal cause of divorce in this state. *Chase* v. *Chase*, 6 Gray, 157.

If this were a mere private action, or suit in which the personal rights of the parties alone were concerned, there would be strong reason for applying the doctrine of estoppel, to the act of the husband, in resisting the present motion of the wife. But a suit for divorce is of a very different character; it is one in which the public have an interest, and in the conduct and result of which the best interests of society are concerned. Where proceedings in divorce are rightly commenced and conducted, the decree of divorce fixes the *status* of the parties for all purposes. But if the statute declares the divorce in Indiana wholly void and without force in this state, it cannot be made good by the consent of either or both the parties. Should the husband marry again, here or elsewhere, and come into this state, would he not be liable to public prosecution for bigamy or adultery; would not such second marriage be adultery as against the former wife, and would not his children, if any, be illegitimate? Would not the same consequences follow, should the wife marry?

But another aspect of the question leads to the same result. Marriage is undoubtedly a contract, but it is a contract sanc-

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tioned by law, controlled by considerations of public policy vital to the order and harmony of social life, and in its nature indissoluble, except by violations of duty on the one part, to be taken advantage of in a special manner, provided by law, on the other. Neither party can do any act, by way of release, grant, stipulation or agreement, to dissolve such contract; and yet by any of these acts one could estop himself in a matter of private right. Without saying that in no case can the law or principle of estoppel apply in matters of divorce — as in regard to the service of process, or admissions or confessions of fact, where all suspicion of collusion is effectually excluded — we are of opinion that the libellant is not estopped from insisting that the decree of divorce in Indiana is void in this commonwealth, and therefore that there is no ground for dismissing this libel, for the alleged cause that the relation of husband and wife no longer subsists between the parties. See *Lyon* v. *Lyon*, 2 Gray, 367; *Ditson* v. *Ditson*, 4 R. I. 87. *Motion to dismiss overruled.*

SAMUEL THOMPSON *vs.* CHARLES G. BURNHAM, Administrator.

The provision of the *St.* of 1855, *c.* 283, that the *St.* of 1852, *c.* 294, (which shortened from four to two years the period of limitation of actions by creditors against their debtor's executor or administrator,) shall not apply "to any right of action of any creditor of the estate of a deceased person against the executor or administrator of such person, which had accrued or existed against such deceased person, his executor or administrator, prior to the passage of said act," applies to a right of action against an executor or administrator who gave bond within two years before the passage of the act of 1855, and which existed against his testator or intestate prior to the passage of the act of 1852.

ACTION OF CONTRACT, commenced on the 27th of February 1857, upon two promissory notes, made to the plaintiff in 1850 and 1851, by the defendant's intestate, Nicholas White, late of Newton, in the State of New Hampshire, deceased, and payable on demand. Answer, that the action was commenced more than two years after the defendant had given bond as adminis-

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trator of White's estate in this commonwealth, although due notice had been given of his appointment.

At the trial in the court of common pleas in Essex, it appeared that White died in the summer of 1853, and that the defendant's bond as administrator was given on the 8th of August 1854. *Mellen*, C. J. ruled that the action was barred, and the jury, by his direction, returned a verdict for the defendant.

The plaintiff alleged exceptions, which were argued at November term 1858 in Essex.

W. P. Webster, for the plaintiff.

O. P. Lord, for the defendant. This case is not within the *St.* of 1855, *c.* 283, excepting from the operation of the *St.* of 1852, *c.* 294, "any right of action of any creditor of the estate of a deceased person, against the executor or administrator of such person, which had accrued or existed against such deceased person, his executor or administrator, prior to the passage of this act." The purpose of that provision was to confirm the decision of this court in *King* v. *Tirrell*, 2 Gray, 332. It must be construed as if limited to rights of action which had existed "against such deceased person's executors or administrators." There can be no right of action against a deceased person; nor against his executor or administrator until after his decease. The policy of the statutes is to include only claims against his estate. The court will not adopt a construction which gives the longest time to sue upon the oldest debts.

Shaw, C. J. The defendant's intestate lived and died in New Hampshire, without the jurisdiction of this commonwealth. Administration was taken on his estate in the state of his domicil; and subsequently administration was taken by the defendant in this state, on the ground that there was estate here to be administered. The plaintiff has had his domicil here ever since the notes were given. There is no question in regard to the general statute of limitations, because it never began to run in the lifetime of the intestate.

The question is, whether the action is barred by the statute limiting the time within which suit must be brought against executors and administrators. The statute reducing the former

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term of four years to two years, *St.* 1852, *c.* 294, was passed on the 20th of May 1852, and took effect in thirty days. Administration was taken and bond given by the defendant on the 8th of August 1854, and due notice thereof given by the defendant. This action was brought on the 27th of February 1857. It was therefore commenced more than two years after bond given, but within four years of that date, and within four years of the death of the intestate, if that fact is material. The act of 1855, *c.* 283, was passed on the 2d of May, and took effect from its passage.

A case upon the first of these acts, before the other was passed, came before this court, and has been reported. *King* v. *Tirrell*, 2 Gray, 331. In that case it was decided, as the true construction of the statute, notwithstanding some little vagueness of expression, that the statute did not apply to a case where the administration had been taken and the bond given before the statute passed.

Another case came before the court at November term 1857 in Suffolk. *Page* v. *Melvin*, 10 Gray, . In that case it appeared that the administration was taken and the bond given in April 1853, after the act of 1852 went into operation; and the two years' limitation terminated in April 1855. This was several weeks prior to the passage of the *St.* of 1855. It was argued that the case was within the excepted cases mentioned in the *St.* of 1855, to which it was enacted that the statute of 1852 should not apply. But it was answered, and decided by the court, that as the *St.* of 1855 was not passed until after the action had become barred under the operation of a law then in full force, the statute could not so operate retrospectively as to take away a bar to the action which had thus became absolute before its passage. *Wright* v. *Oakley*, 5 Met. 400.

This case differs from both the preceding, and the question is, whether it is exempted from the bar, which would have existed by force of the *St.* of 1852 limiting the action to two years; and was saved by the exceptions and qualifications of the *St.* of 1855. This act was passed and went into operation on the 2d of May 1855, at which time the two years from the administrator's bond given in April 1854 had not expired, and the action had not

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therefore become absolutely barred, and therefore the principle of *Page* v. *Melvin* does not apply to it.

By this statute it is enacted that the *St.* of 1852 "shall not apply, or be construed to apply, to any right of action of any creditor of the estate of a deceased person, against the executor or administrator of such person, which had accrued or existed against such deceased person, his executor or administrator, prior to the passage of said act."

It is hardly necessary to criticise the language of this act, in declaring how a former act shall be construed. It is one of the familiar and first principles of law, that the making, altering and repealing of all laws pertain to the legislature of the Commonwealth; but the construction and interpretation of them to its jurisprudence. But in construing legislative acts, we are to look at the substance rather than the letter, and ascertain, if possible, the intent of the legislature in any enactment, and carry it into effect if possible. All laws are, if possible, to act prospectively, and not to affect transactions already passed. When, therefore, it is declared that a past enactment shall be so construed as to have a certain effect, especially if it differs from a true judicial construction, it is equivalent to declaring that the enactment in question shall be so altered and modified as to have the declared operation; and under the power of the legislature to make and alter laws, such enactment would be valid as to all acts occurring after its passage.

What then are the cases intended to be excepted from the operation of the act of 1852? We feel great doubt in answering this question. The act seems to be obscure and ambiguous. It is argued that the purpose of the act of 1855, in effect, was to confirm the decision in *King* v. *Tirrell*, which had preceded it, and to declare authoritatively that the act of 1852 should not apply to cases, where a cause of action against the executor had accrued to the creditor, before the passage of that act. If it had stopped at the words "such person," in the third line from the bottom, there would have been force in this argument. But it goes on more particularly to define the causes of action excepted, thus: "which had accrued or existed against such

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deceased person, his executor or administrator." Here such "person" is put in direct contradistinction to his executor or administrator. But no right of action can accrue against the person deceased, nor against his estate in any other form than by an action against his representative. We think, therefore, it is equivalent to saying "which had accrued to the creditor against the debtor in his lifetime, or his representative after his decease." Had a different meaning been intended, it would have been easily expressed by saying "against the executor or administrator of such deceased person."

We are therefore of opinion that it is the true interpretation of the act of 1855, to except from the two years' bar all actions against executors and administrators, wherein the causes of action accrued to the creditor prior to the act of May 1852; leaving all which accrued afterwards, to the operation of the two years' bar. The effect of this will be to kèep estates open four years, as formerly, where there are outstanding claims; but by the lapse of time these cases will be constantly diminishing.

In the present case, the causes of action, on which this suit was brought, having accrued to the creditor before May 1852, and the two years' bar not having run, when the act of 1855 came into operation, and extended the time from two to four years, as it well might, this action was not barred by the *St.* of 1852. *Exceptions sustained*

ALFRED IRVIN *vs.* JOHN H. GREGORY.

An action at law, praying for relief in equity, under *St.* 1853, *c.* 371, to enforce the specific performance of a contract, is to be treated as a suit in equity.

A bill in equity, to enforce the specific performance of a written contract to convey land on the payment of the purchase money, may be maintained without a previous tender of the money or bringing it into court; if the plaintiff has offered the defendant a sum within a trifle of the amount due, which the defendant has refused to accept; and avers his readiness to pay whatever the court shall order.

ACTION OF CONTRACT, commenced on the 29th of April 1854, praying for relief in equity under *St.* 1853, *c.* 371, to enforce the

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specific performance of a bond, dated May 24th 1852, to convey to the plaintiff in fee a parcel of land in Marblehead for $150, on the payment by the plaintiff to the defendant of "the said consideration money of one hundred and fifty dollars on or before the expiration of five years from this date, with interest semiannually from this date until the whole shall be paid."

The declaration alleged that the plaintiff "did well and truly pay or tender to pay to said defendant the sum of one hundred and fifty dollars before the expiration of five years from the date of said bond, and did pay interest semiannually until said principal sum was paid or tendered to be paid; that upon such payment and tender of payment, said defendant refused to convey the premises described in said bond; and that the plaintiff has always been and still is ready to pay to said defendant any balance which is due to him, the same having been already tendered; and that whenever this honorable court shall make any decree in the premises, he will pay over the same conformably thereto."

At the trial in Essex, the plaintiff offered to prove that on the 7th of January 1854 he paid to the defendant $107, being the interest due up to that time, and $93.50 of the principal; and on the 1st of March following tendered to the defendant the sum of $57.42, in full for the principal and interest then remaining due; that the defendant made no objection to the sufficiency of the amount tendered, nor any other specific objection thereto; but refused to accept the sum offered, and said to the plaintiff, "Go away, you don't owe me anything."

The defendant objected that proof of these facts would not maintain this action; for the reason that the sums paid and tendered did not together amount to the whole sum due to the defendant according to the terms of the bond. *Merrick*, J. took a verdict for the defendant, and reserved the question for the consideration of the full court, before whom it was argued in Essex at November term 1858.

S. H. Phillips & J. A. Gillis, for the plaintiff, cited 2 Story on Eq. §§ 746, 751; Fry on Spec. Perf. § 619; *Ensign* v. *Kellogg*, 4 Pick. 1; *Buffum* v. *Buffum*, 11 N. H. 459; *Brashier* v. *Gratz*.

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6 Wheat. 528; 2 White & Tudor's Lead. Cas. in Eq. 405, Amer. note; *Hepburn* v. *Dunlop*, 1 Wheat. 179; *Taylor* v. *Longworth*, 14 Pet. 172; *Parker* v. *Perkins*, 8 Cush. 318; *Tinney* v. *Ashley*, 15 Pick. 645; *Hazard* v. *Loring*, 10 Cush. 269; *Barker* v. *Parkenhorn*, 2 Wash. C. C. 142; *Bligh* v. *Ashley*, Pet. C. C. 15; *Bacon* v. *Conn*, 1 Sm. & Marsh. Ch. 348.

J. H. Robinson, for defendant. 1. This is an action at law, and must be governed and decided by the rules of law. *St.* 1853, *c.* 371. Rev. Sts. *c.* 81, § 7.

2. The necessary averment in the plaintiff's declaration, that he has paid or tendered to the defendant the sum due to him according to the conditions of the bond, was not supported by the proof, and therefore a verdict was rightly rendered for the defendant. *Boyden* v. *Moore*, 5 Mass. 365. *Brooks* v. *Wheelock*, 11 Pick. 439. *Bailey* v. *Metcalf*, 6 N. H. 156.

3. An offer, in the declaration, to pay whatever sum may be found due to the defendant, does not relieve the plaintiff, either in law or in equity, from the necessity of averring and proving payment or tender of payment before action brought. *Bailey* v. *Metcalf*, 6 N. H. 156. *Tirrell* v. *Merrill*, 17 Mass. 117. 2 Greenl. Ev. §§ 603–605.

Shaw, C. J. This action was commenced in April 1854. At that time the *St.* of 1853, *c.* 371, was in force, giving remedies in equity in suits at law. It provided that certain suits, enumerating many, and, among others, "all suits for the specific performance of any written contract," should be by action of contract, setting forth the facts, and praying for relief in equity. This statute was generally regarded as by its terms superseding the proceeding by regular bill in equity, until the passage of *St.* 1855, *c.* 194, § 2, by which the option was given to proceed by bill in equity or by a declaration in an action at law.

This suit was commenced whilst the former alone of these acts was in force. It set forth a contract in writing by the defendant with the plaintiff to convey to him a parcel of land in fee, on the payment of a certain sum, at any time within five years, with interest semiannually. The suit is in form an action at law, praying relief in equity; and as specific performance

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cannot be had by a judgment at law, but may be afforded in equity, we regard this action, by force of the *St.* of 1853, as a suit in equity, and that rules and principles of equity are applicable to it.

It will be perceived that by the terms of the contract, the money was to be paid at any time within five years, with interest semiannually. The time therefore was optional with the obligee for payment of the principal of the stipulated purchase money. It appears by the evidence that the three first half years' interest of the purchase money was paid and indorsed in January 1854, and before the expiration of another half year, in March 1854, the supposed tender was made. There was then no breach of the contract on the part of the plaintiff. It was not a tender in discharge of any obligation, or to save any forfeiture at law. But it was rather a declaration of readiness and a conditional offer to perform on his part, on receiving the deed from the other party.

When a strict tender of money is required, it must be an unconditional offer of the full amount due, leaving it only at the will of the other to accept it. But when, in their nature, the stipulations are, the one to pay money and the other to execute a conveyance, and no time fixed, and no provision that either is to be done first, the covenants are mutual and dependent. The one is not bound to pay, without receiving his conveyance; nor the other to part with his land, without receiving his money. The performances must be simultaneous. In such case, it is not necessary on the part of the purchaser to make a strict tender, and actually to deliver over the money unconditionally, without his deed; it is sufficient that upon reasonable notice to the owner he is ready and willing to perform, and when the performance is the payment of money, that he has the money and is able and prepared to pay, and demands the deed, and the other absolutely refuses to receive the money and execute the deed; that is a sufficient tender of performance to warrant the party so offering to maintain his action. And there may be both dependent and independent stipulations in the same agreement. *Kane* v. *Hood*, 13 Pick. 281. *Couch* v. *Ingersoll*, 2 Pick. 292.

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The first of these cases is a direct authority on both points, and we think states the principles of law correctly.

In this case it appears that the plaintiff in March 1854 went to the defendant, and proposed to pay him the balance due, in order to have a conveyance of the land, according to contract. The defendant told him, "Go away, you don't owe me anything." It is true that the plaintiff owed him nothing, and the money was not tendered in payment of any debt. But it was an offer to perform on his part, and a refusal on the part of the defendant. The fact that the plaintiff had made a computation of the amount due, and tendered the specie accordingly, a fraction short of what was actually due by computation, when he was not bound to make a strict tender, does not prevent his act from being a good offer of performance, if the other party was ready to perform on his part. But making no objection to the amount, the defendant wholly refused to perform.

The same consideration is an answer to the other objection, that the money was not brought into court. When money is brought into court, with a plea of tender, it is an admission of the party bringing it that the adverse party is entitled to it, and may take it out when he pleases. But in a suit for specific performance, it is sufficient for the plaintiff to offer by his bill to bring in his money, whenever the sum is liquidated, and he has a decree for performance.

The court are therefore of opinion, that the verdict must be set aside, and the case stand for trial.

Dan Weed *vs.* Samuel S. Crocker.

An indenture, by which W. leases and devises "a mill to C. for a term of ten years yielding and paying rent therefor" a certain sum quarterly, to commence two months after this date; and C. "desiring that additions may be made to said mill, proposes to advance the capital necessary for said additions, said advance to be deducted from the rent," and "said C., lessee, agrees to pay an additional rent" for the additions, "of ten per cent. yearly on their cost," and "proposing to hire water power in connection with said

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mill, hereby covenants and agrees to pay W." a certain rent semiannually for the water power; and that he will pay the taxes, and not suffer waste, nor "assign the said lease, or underlet, without the consent of the lessor;" and "at the termination of this lease said C. is to have the right of renewing said lease for five years," is a lease, and not an agreement for a lease.

Under a provision in a lease, that the lessor shall erect certain additional buildings, for which the lessee agrees to pay an additional rent "of ten per cent. yearly on their cost," no rent is due until notice to the lessee of the cost of the additional buildings.

In a lease of a paper mill, the lessee covenanted to pay rent for certain water power to be furnished by the lessor, and to put in at his own expense all machinery "except the main shaft and wheel, which is to be furnished by the lessor." *Held*, that the rent was not due until the lessor had furnished the main shaft and wheel.

ACTION OF CONTRACT to recover the rent of a paper mill and water power in Lawrence, from the 1st of January 1854 to the 1st of April 1856, under a sealed agreement, executed by the parties, of which the following are the material parts:

"This indenture, made this first day of October in the year eighteen hundred and fifty three, by and between Dan Weed of Lawrence, and Samuel S. Crocker, witnesseth, that the said Dan Weed hereby leases and demises unto the said Samuel S. Crocker, for the term of ten years," a certain part of the mill, "the said Samuel S. Crocker yielding and paying rent therefor the sum of five hundred dollars per year, payable quarterly, and the rent to commence on the first day of January in the year one thousand eight hundred and fifty four.

"And whereas the said Samuel S. Crocker, desiring that additions may be made to the said mill, namely, one L part for a paper machine, said L to be 38 feet long and 22 feet wide, ceiled, one story high, with a finishing room 20 feet square, with a small addition in front of the main mill, proposes to advance the capital necessary for said additional buildings, and for a small percussion wheel and driving power, to the lessor, said advances to be deducted from the rent of said buildings; and said Crocker, lessee, agrees to pay an additional rent, for said additional wheel, driving power and buildings, of ten per cent. yearly on the cost of said wheel, driving power and added buildings, in addition to the rent before named of five hundred dollars for the main portion of said mill.

"And the said Samuel S. Crocker, proposing to hire water

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power in connection with said mill, hereby covenants and agrees with said Weed to pay said Weed, for thirty seven horse power, the same amount of money which said Weed is required to pay the Essex Company, namely, fifteen dollars per horse power, making $555 for said 37 horse power; and the said Samuel S. Crocker hereby covenants and agrees for himself, his executors and administrators, to and with the said Weed, his heirs and assigns, that he will pay the rent for said water power on the last day of February and the last day of August in each and every year, in semiannual payments.

"And the said Samuel S. Crocker, for himself, his executors and administrators, covenants and agrees with said Dan Weed, his heirs and assigns, that he will pay the taxes on said mill and buildings; that he will not suffer any strip or waste; that he will not assign the said lease, or underlet the whole or any part of the premises to any person, without the consent of the lessor in writing, or of his heirs or assigns; that he will keep the premises in good condition; and that said premises shall only be occupied for the manufacture of paper; and that he, the said lessee, will put in, at his own expense, all shafting, gearing, belting and all other machinery in said premises, excepting the main shaft and wheel, which is to be furnished by said Weed."

"At the termination of this lease said Crocker is to have the right of renewing said lease for five years, giving said Weed or his assigns three months' previous notice."

"Said Weed is to have the buildings finished by the 1st of January next."

The declaration, in several counts, alleged that the defendant on the 1st of January 1854 entered into and occupied the part of the mill demised to him, and owed the plaintiff for rent of that part from that day to the 1st of April 1856, at the rate of $500 yearly; and also owed him for water power from the 1st of January 1854 to the 1st of March 1856, at the rate of $555 yearly; and also owed him ten per cent. a year from the 1st of January 1854 to the 1st of March 1856 upon the cost of the additions specified in the lease, and since made by the plaintiff.

The defendant, in his answer, denied the lease, his own entry

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and occupation, and any liability for rent or for water power; admitted the execution of the instrument counted upon; but alleged that it was an agreement for a lease, to be thereafter made, if the plaintiff should do certain things which he therein agreed, but had since refused to do; and that the plaintiff had not performed the stipulations, on his part, above set forth.

The trial was in Essex before *Merrick*, J., who signed a bill of exceptions, so much of which as relates to the points decided was as follows:

"The defendant contended that the said instrument was not a lease, but a contract for a lease. But the court ruled that it was a lease.

"The defendant contended that the covenants to pay the rents in the lease were dependent upon the covenants or stipulations of the plaintiff. But the court ruled that the covenants to pay rent for the old part of the building, and for the water power, were independent of the covenants or stipulations of the plaintiff. As to rent for the new part, the court ruled, that if the defendant occupied the new part, his covenant to pay rent was independent of the covenants of the plaintiff, and that it was not open to him to show that the stipulation to build the new part had not been substantially complied with, by evidence of the state and character of the building, walls and foundation.

"As to the rent of the new part, the defendant contended that no rent was due until demand made, or at least until notice given of the cost of the new part or of the amount of rent claimed. But the court ruled that the rent was due without such demand or notice."

"As to the rent of the water power, the defendant especially contended that his covenant to pay it depended upon the plaintiff's covenant to furnish a wheel and shaft suitable for the use and application of that power to the machinery. But the court ruled that it was an independent covenant."

The "court instructed the jury that the instrument was a lease, and that it followed, as matter of law, that the rents declared for were due, to wit: the $500 a year for the old build-

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ing, the $555 a year for the water power, and the ten per cent a year on the cost of the new part; and that the latter was due without demand on the defendant therefor, and without notice of the amount due or claimed, and that the plaintiff could recover ten per cent. on the cost, whatever that might be."

"The jury found for the plaintiff. To the several rulings and refusals to rule the defendant excepts."

This case was argued at Salem at November term 1858.

R. H. Dana, Jr. & S. B. Ives, Jr. for the defendant. 1. The instrument declared on was an agreement for a lease, and not a lease. (1.) This question is to be determined by the intention of the parties, and not by any particular form of words. 1 Platt on Leases, 579 *& seq.* Taylor Landl. & Ten. § 37. Chit. Con. (8th Amer. ed.) 313. *Morgan* v. *Bissell*, 3 Taunt. 65. *Perring* v. *Brook*, 1 M. & Rob. 510. (2.) To make it a lease, there must appear to be an intention on the part of the party in possession to divest himself thereof forthwith. 2 Parsons on Con. 24. (3.) As to the new part, there was no "present demise," because it was not in existence when the paper was executed; and further, there are no words of demise at all. (4.) As to the old part, there is no express stipulation to pay rent, as there is in regard to everything else. (5.) The words, "desiring," "proposes to advance," "proposes to hire," &c., show that the parties were looking to a future demise. *Aiken* v. *Smith*, 21 Verm. 172. (6.) As to the water power, there are no words of present demise, or of any demise at all; but merely the lessee "proposing to hire," "covenants and agrees to pay," &c. (7.) The fact, that so much was to be done by the plaintiff before the premises were to be actually occupied, furnishes a presumption that this was but an agreement for a lease. *Morgan* v. *Bissell*, 3 Taunt. 65. (8.) The time when the occupation of the new part and the water power should commence, and the length of the term are not stated in the instrument. (9.) There is no *habendum* as to any part of the premises.

2. If this is a lease of the new part, the amount of the rent was to depend on the cost of the new part; and as that cost was a matter peculiarly and exclusively within the knowledge

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of the plaintiff, the defendant was entitled to notice and demand. *Barnes* v. *Parker*, 8 Met. 135.

3. The covenants of the defendant were dependent upon those of the plaintiff. *Liddell* v. *Sims*, 9 Sm. & Marsh. 596. *Peques* v. *Mosby*, 7 Sm. & Marsh. 340. *Greenwood* v. *Ligon*, 10 Sm. & Marsh. 615. *Wright* v. *Smyth*, 4 W. & S. 527. *Adams* v. *Williams*, 2 W. & S. 227. *Dwiggins* v. *Shaw*, 6 Ired. 46. *Grant* v. *Johnson*, 1 Seld. 247. *Howland* v. *Leach*, 11 Pick. 151. *Knight* v. *New England Worsted Co.* 2 Cush. 288. *Fairman* v. *Fluck*, 5 Watts, 516.

O. P. Lord & D. Saunders, Jr. for the plaintiff. 1. The instrument declared on is a lease. *Bacon* v. *Bowdoin*, 22 Pick. 401. *Moshier* v. *Reding*, 3 Fairf. 478. *Jenkins* v. *Eldredge*, 3 Story R. 325. *Averill* v. *Taylor*, 4 Seld. 44. Com. Dig. Estates, G. Bac. Ab. Leases, K.

2. There was no necessity for demand or notice of the amount of the cost of the new part of the building. *Burnham* v. *Allen*. 1 Gray, 496.

3. The covenants of the lessor and lessee, so far as they relate to any matters in issue between the parties, are independent covenants. *Couch* v. *Ingersoll*, 2 Pick. 300. *Tileston* v. *Newell*, 13 Mass. 410. *Seers* v. *Fowler*, 2 Johns. 272. *Barruso* v. *Madan*, 2 Johns. 145. *Goodwin* v. *Holbrook*, 4 Wend. 377. *Day* v. *Essex County Bank*, 13 Verm. 97. *Wilcox* v. *Ten Eyck*, 5 Johns. 78. *Hill* v. *Thorn*, 2 Mod. 309.

Shaw, C. J. It is to be regretted that the pleadings in this case are somewhat obscure, and the facts in them stated in such a manner, that it is extremely difficult to understand what questions were intended by the parties to be put in issue. The instrument relied on as a lease, executed by both parties, has so many provisos, stipulations and limitations, that it is difficult to understand the intentions of the parties to it.

1. We can have no doubt that this instrument is a lease. The words are plain and clear, and used in the present tense, "hereby leases and demises." It is expressly for the term of ten years; and as the rent is to commence on the 1st of January ensuing, it is equivalent to saying that it is for a term of ten

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years, commencing on the 1st of January following its date. It is no objection that the term is to commence *in futuro*. It is a familiar principle of law, that a lease may create a term to commence *in futuro;* but, as a general rule, a deed cannot create a freehold to commence *in futuro;* and this is the established distinction.

It will not be necessary to consider all the questions raised by the exceptions; we shall notice a few of the most prominent.

2. In regard to the rent of the new part of the building stipulated in the lease to be built by the lessor, and for which the lessee stipulated for the payment of ten per cent. upon the cost as rent, the defendant contended that no rent was due until demand made, or at least until notice was given by the lessor to the lessee of the cost of such new part, on which the ten per cent. was to be computed; but the court ruled that the rent was due without such demand or notice.

The court, on reconsideration, are of opinion that this direction was not correct. The stipulation was to pay a sum, by way of rent for the new part, uncertain at the time it was made, but to be rendered certain by the actual expenditure in the erection. When that should be ascertained, the rent would be made certain by mere computation. But such cost was exclusively within the knowledge of the lessor, who had incurred and paid it. Where a fact, upon which liability to an action depends, lies exclusively or peculiarly within the knowledge of the party entitled to bring an action, the law coincides with the dictate of natural justice, in requiring the creditor to give notice of it. Such notice was peculiarly necessary to the lessee, to enable him to pay his rent at the day, not only to avoid a suit, but to save himself from a forfeiture of his term. The proposal in the lease, that the lessee should advance money for the purpose of building the new part, and take it out of the accruing rents, did not exempt the lessor from the duty of thus giving notice of the cost on which the rent at ten per cent. is to be computed, because he might not pay it at all; or if he paid money on that account, it might not be the exact amount.

3 The defendant contended that the covenants to pay the

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rents in the lease were dependent on the covenants or stipulations of the plaintiff; but the court ruled that the covenants to pay rent for the old part of the building and for the water power were independent of the covenants and stipulations of the lessor, the plaintiff. As to the rent of the new part, the court ruled that if the defendant occupied the new part, his covenant to pay rent was independent of the covenants of the plaintiff. And in another part of the exceptions, it appears that as to the rent due for water power the defendant specially contended that his covenant to pay it depended upon the plaintiff's covenant to procure a wheel and shaft suitable for the use and application of that power to the machinery; but the court ruled otherwise. And further, towards the close of the exceptions, the court instructed the jury that the instrument was a lease, and that it followed, as matter of law, that the rents declared for were due, to wit, $500 for the old building, $555 a year for the water power, and ten per cent. a year on the cost of the new part.

We do not see how these rulings can be sustained, considered in reference to the facts in the case. The premises were leased for a paper mill, and there was a stipulation by the lessor that it should be used for no other purpose than the manufacture of paper. To this purpose water power was essential and indispensable.

Whether covenants in an agreement between parties are dependent and conditional, or are independent and absolute, depends somewhat upon the terms, but much more in the nature of the things to be done, and their relations to each other.

Nor is it material in what part of the instrument the conditional stipulation appears, if in its nature the one act must necessarily precede the other. If there is a mutual agreement between A and B, A to build a carriage for B at a price agreed, B enters into a stipulation to furnish A the necessary materials. The respective agreements are absolute and unconditional in terms. But it is impossible for A to begin the work until B furnishes the materials for him to work upon; it follows therefore that A's contract is dependent, and he cannot be chargeable

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with a breach until B has performed on his part. *Cadwell* v. *Blake*, 6 Gray, 402.

In the present case, the stipulation on the part of the lessor is briefly and somewhat obscurely expressed; but we think it is quite intelligible. It is thus: towards the close of a long paragraph stipulating, among other things, that Crocker will pay said Weed for thirty seven horse power, $555; and that "the said lessee will put in, at his own expense, all shafting, gearing, belting and all other machinery in said premises, excepting the main shaft and wheel, which is to be furnished by said Weed."

As the water power was essential to the entire use of the premises as a paper mill, and as that could only be obtained by a main shaft and water wheel, by which the power was to be created and transmitted to all the rest of the machinery, the furnishing of such a water wheel and main shaft by the lessor was a condition precedent, and the stipulation of the lessee to pay rent was dependent, and the direction in this respect was not correct.

Perhaps, however, the defendant did not put his objection upon the ground that the lessor did not furnish any main shaft and wheel, but that he did not furnish a wheel and shaft suitable and properly adapted to the object. There are no such qualifying terms to the stipulation, but we think they may be fairly implied as the legal effect of the stipulation. The object being to raise and transmit a thirty seven horse power, a stipulation to furnish a wheel for that purpose was equivalent to an engagement to furnish a suitable, proper and sufficient wheel. If such was the intent of the exception, then it appears to us that it would be necessary to discriminate in the instruction to the jury. If the plaintiff furnished no wheel and shaft, it would be a plain failure in the performance of a condition precedent.

But if the lessor did furnish a wheel and shaft, as and for the wheel and shaft stipulated for, and the lessee accepted and went to work with it, and so continued to use it during the time for which rent is claimed, although the lessee shows that it was not suitable and sufficient, still he cannot treat such failure to perform as a breach of condition, which will excuse him from the

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payment of rent. The rent is due, and if the lessee has sustained damage, his remedy is on the lessor's covenant.

As the jury were instructed that all the covenants for payment of rent were independent and absolute, we think that on this ground, as well as the former, the verdict must be set aside, and a new trial ordered.

Thomas Loring *vs.* George Whittemore, Executor.

A bond, having indorsed upon it a parol agreement signed by both parties, varying its terms, and also a subsequent sealed agreement, executed by both parties, by which the time of performance is extended and "the foregoing bond is acknowledged to be in full force in every respect for the time here stated," is a sealed instrument, and an action thereon is not barred, by the statute of limitations, in six years.

It seems, that where all matters in dispute are submitted to arbitration by mutual bonds to perform and abide by the award, and the award is that one party shall convey certain notes and accounts to the other, and shall recover a certain sum from the other in full of all demands, he may maintain an action on the other's bond, to enforce payment of that sum, without showing a transfer of the notes and accounts.

An award that one party to the submission is entitled to certain land does not require the other party to make any conveyance or assurance thereof to him.

In an action on an arbitration bond, if the defendant, having the bond in suit in his possession, refuses to produce it on notice, the plaintiff may prove its contents by the counter bond in his own possession, and oral evidence.

An agreement under *St.* 1857, *c.* 267, waiving a trial by jury, submits the facts to the determination of the presiding judge.

Action of contract, commenced on the 29th of April 1857 upon a bond executed by Nathaniel Whittemore, the defendant's testator, on the 20th of June 1841, to perform and abide by the award of Francis G. Ford, Edward Thaxter and Luther J. Barnes, concerning the settlement of the partnership of Loring & Whittemore, and all other matters in dispute between them; "the award of said arbitrators to be made known in writing to the parties, and delivered by said arbitrators to each of them on or before the first day of July next ensuing." Upon the bond were indorsed several agreements under seal, extending the time within which the award should be made; an agreement, not under seal, dated December 2d 1841, by which the parties "agree to substitute James C. Doane, of Cohasset, as

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one of the referees, in place of Edward Thaxter, deceased;" and a sealed agreement, dated December 27th 1841, by which the time is further extended to the 1st of March 1842, "and the foregoing bond is hereby acknowledged to be in full force and virtue in every respect for the time here stated for the extension of the time for the final award and determination of said reference."

The declaration alleged that by this bond, and by a counter bond executed by the plaintiff, and by the subsequent agreements, the parties submitted their disputes to arbitration; that the arbitrators awarded that Loring should transfer to Whittemore certain notes and accounts taken by Loring upon a division of the partnership property, and that each party should thenceforward hold at his own risk all notes and accounts so taken; "that said Whittemore is entitled, in right of his wife, to one quarter part of" certain land; and that Loring recover of Whittemore a certain sum in full of all demands. The award was dated January 31st 1842.

Answer, that the cause of action did not accrue within six years; that the defendant was ignorant whether the bond and subsequent agreements were ever given by the defendant's testator to the plaintiff, or whether such award was ever made; that, if the bond was ever given, it was afterwards discharged and satisfied, and delivered up to said testator, and the award, if ever made, had been performed on his part; and that the plaintiff had never conveyed to said testator the notes and accounts, or conveyed or assured to him, in right of his wife, the quarter part of the land in question, as by the award he was bound to do.

The parties waived a jury trial, under *St.* 1857, *c.* 267, and the cause was heard in Plymouth, by *Metcalf*, J., who reported the case, and "reserved all the questions arising thereon for the consideration of the full court."

The plaintiff's counsel read a notice which had been duly served on the defendant, requiring him to produce the bond signed by his testator, (which was admitted to be in his possession,) and, not receiving it, he offered in evidence a bond signed

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by the plaintiff, precisely like the one declared upon, and having like agreements indorsed thereon, and executed by both parties, and also a paper purporting to be an award of the referees. The defendant objected, because the bond was not that declared on. The plaintiff contended that the paper purporting to be an award was a duplicate of the original; and he claimed the right to use the bond signed by himself, for the purpose of showing, by the agreements indorsed thereon, and by oral evidence, the contents of the bond declared upon; the two bonds having, as he contended, changed hands, without having been discharged, or the money awarded paid. The judge admitted the evidence.

The judge reported the whole testimony, and reported, "as facts proved, the facts to which the witnesses testified," in substance as follows:

There were two bonds before the referees, precisely alike "except the reversal of the parties," of which the bond introduced by the plaintiff, with the indorsements upon it, was one. Two copies of the award were made, and one given to each party, of which the award introduced by the plaintiff was one. Immediately upon the making of the award, or within a day or two afterwards, the plaintiff's bookkeeper (who had charge and possession of all his papers) received from him, and had since kept the bond and award now produced by the plaintiff; but neither he, nor the plaintiff, to his knowledge, had had possession of the accounts mentioned in the award. The plaintiff's books showed no entry of any payment on the award. At the close of the hearing before the referees, the books and papers of the firm of Loring & Whittemore were taken to Whittemore's shop, and Loring did not have possession of them until after Whittemore's death, when he received some of them back. Whittemore's bookkeeper had no remembrance of any payment by Whittemore upon the award. Whittemore very frequently spoke of the award as unjust, and declared his intention never to pay it. Some other evidence offered by the plaintiff was rejected. The defendant called no witnesses.

The judge's report concluded thus: "On the papers above

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referred to, and the facts testified to by the several witnesses as above referred to, my opinion was that the plaintiff was entitled to recover, supposing the rulings as to the reception and rejection of evidence to have been right. But, at the request of the defendant's counsel, this report is made, and the whole court will dispose of the case as the law shall be found to require."

This case was argued at Boston in January last.

L. Shaw, Jr. (*J. J. Clarke* with him,) for the defendant, was first called upon. 1. If this action is on the bond, and to be deemed as corresponding to the common law action of debt on bond, or of covenant on deed of submission, it must fail; for the contract to submit to Thaxter and others, contained in the sealed instrument, was at an end when the parol agreement of submission to Doane and others was made. The specialty, in such a case, is merged and incorporated in the subsequent parol agreement, and the only remedy is by action on the entire parol agreement. *Brown* v. *Goodman*, 3 T. R. 592, *note*. *Littler* v. *Holland*, 3 T. R. 590. *Greig* v. *Talbot*, 2 B. & C. 179. *Heard* v. *Wadham*, 1 East, 629, 630. *Vicary* v. *Moore*, 2 Watts, 456. *Luciani* v. *American Fire Ins. Co.* 2 Whart. 167. *Freeman* v. *Adams*, 9 Johns. 115. *Langworthy* v. *Smith*, 2 Wend. 587. *Jewell* v. *Schroeppel*, 4 Cow. 564. *Myers* v. *Dixon*, 2 Hall (N. Y.) 456. *Brown* v. *Copp*, 5 N. H. 346. *Peters* v. *Johnson*, 3 Har. & Johns. 291. If this action is on the parol agreement, and corresponds either to debt on the award, or assumpsit on the agreement, it is barred by the statute of limitations.

2. The delivery of the notes and accounts to Whittemore, and the performance of the acts required by the award, were conditions precedent to the plaintiff's recovery of the money; or were, at least, concurrent acts with the payment to him; and therefore the declaration should aver that he was ready and willing to deliver them. *Huy* v. *Brown*, 12 Wend. 591. *Matthews* v. *Matthews*, 2 Curt. C. C. 117. *Shearer* v. *Handy*, 22 Pick. 417. *Tinney* v. *Ashley*, 15 Pick. 546. *Pomeroy* v. *Gold*, 2 Met. 500. *Dana* v. *King*, 2 Pick. 155. *Giles* v. *Giles*, 9 Ad. & El. N. R. 164. *Doogood* v. *Rose*, 9 C. B. 132. *Kunckle* v. *Kunckle*, 1 Dall. 365.

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3. Unless the plaintiff was owner of the bond declared on he had no right to put it in suit. In general, ownership of an instrument declared on, and the right to put it in suit, are sufficiently proved by the possession and production of the instrument by the plaintiff. *Pettee* v. *Prout*, 3 Gray, 502. Possession by the defendant gives rise to a presumption that he is the owner of it, and that, consequently, the plaintiff has no right to sue upon it. 1 Greenl. Ev. § 38, & cases cited. 2 Greenl. Ev. § 527, & cases cited. That presumption is conclusive in this case, because the plaintiff could not maintain an action for the bond, on account of the statute of limitations. Or, if not absolutely conclusive, it requires evidence of the most convincing character to rebut it.

4. The court should not have admitted secondary evidence of the contents of the bond. It is always a question in the legal discretion of the court whether a party shall be permitted to introduce such evidence, and if its admission will not promote justice and equity, they will exclude it. *Page* v. *Page*, 15 Pick. 374. *Rogerson* v. *Neal*, 16 Pick. 370.

J. A. Andrew, for the plaintiff.

Dewey, J. 1. The question of the character of the contract between these parties for the submission of certain matters in dispute to arbitrators, who made an award thereon, is doubtless of importance in reference to the statute of limitations. It is contended on the part of the defendant, that although the original contract was under the seals of the parties, and would have been subject only to the statute limitation of twenty years, yet, in consequence of the supplemental agreement made by the parties in writing, but not under seal, under date of December 2d 1841, substituting James C. Doane as one of the referees instead of Edward Thaxter, the specialty was thereby merged and incorporated in the subsequent agreement without seal, and thus assumed the character of a simple contract. Had the case been that of this subsequent contract alone, modifying and materially changing the sealed contract of submission, that consequence might have followed. But such was not the fact. The parties, on the 27th of December 1841, added to the writing

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of December 2d a further modification of their previous submission, and this supplementary writing virtually recognizes all the previous stipulations as to the submission, and is under the hands and seals of the parties. The whole contract thereby assumed the nature of a contract under seal, and is to be dealt with as such.

2. It is then further urged that the plaintiff cannot maintain the present action, because he has not shown a performance on his part of the duties required by the award. We are not satisfied that it was necessary, in this action, for the plaintiff to show a performance of any acts by himself, in reference to the notes and accounts which were awarded to Whittemore. Each party had the separate bond of the other for the due performance of the award by each, and might enforce such performance. Further; from the evidence, the judge might well have found that these notes and accounts were placed in the hands of Whittemore, and this was all the transfer of them required to authorize Whittemore to apply the same to his own use.

As to the land, the award declares a right of property, but does not require any new or further conveyance to be made by Loring; and there is nothing in the case to show that such was the purpose of the referees.

3. In the position of the case, the presiding judge properly admitted the evidence of the bond signed by the plaintiff for the purposes for which it was used.

4. It should be remarked that, in this case, the parties, having waived a trial by jury, thereby submitted the questions of fact to the determination of the presiding judge.

Upon the whole case, the court are of opinion that judgment should be entered for the plaintiff.

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Samuel C. Edwards *vs.* Martin W. Carr.

In an action for driving a horse, hired to drive to another town and back, "so immoderately that he became sick and died," there was evidence tending to show that overdriving of the horse, and want of due care of him, when exhausted and diseased, together occasioned his death; and the judge instructed the jury, against the defendant's objection, that if the horse was exhausted on his arrival at the other town, and refused to eat and drink there, and was not in a fit condition to drive, the defendant had no right to drive him back on the same day; that "to entitle the plaintiff to recover, he must prove that the death of the horse was produced by the overdriving, or the want of ordinary care on the part of the defendant;" and that if the death of the horse was produced partly by the misconduct of the defendant, and partly by the negligence of the plaintiff, the plaintiff was not entitled to recover; and refused to instruct the jury that if a cold taken by the horse, or other cause, coöperated with immoderate driving in producing the death, the burden of proof was on the plaintiff to prove that the second cause existed, or the cold was taken by the horse, through the negligence of the defendant, and before he was redelivered to the plaintiff. *Held*, that these instructions and refusal were correct, and not open to objection, as leaving it to the jury to find a verdict for the plaintiff, on the ground of injury from want of care only, unconnected with immoderate driving.

Action of tort. The plaintiff alleged in the declaration that "the defendant hired of him a horse and chaise to ride from Attleborough to Dedham, and from thence back to Attleborough, in a proper manner; and the defendant drove said horse so immoderately that he became sick and died." The answer admitted the hiring as alleged, but denied "that the defendant drove the horse so immoderately that he became sick and died."

At the trial in the court of common pleas, in Bristol, before *Briggs*, J., the plaintiff offered evidence tending to show that the defendant drove the horse from Attleborough to Dedham, a distance of twenty miles, in two hours and forty minutes; that when he arrived at Dedham the horse was covered with sweat, and appeared greatly exhausted, and neither ate nor drank while there; and that the defendant, knowing the condition of the horse, drove him back to Attleborough, the afternoon of the same day; and that the horse appeared very much exhausted when he arrived there, and would eat and drink nothing, and died in a few days.

The defendant offered evidence tending to prove that the horse was not overdriven; that he was in good condition when

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he left Dedham to return to Attleborough, and went as well all the way as he did in the morning; that he died of a disease which could not be brought on by exhaustion or overdriving alone, but could only be brought on by his taking a severe cold; and that he was not properly taken care of after he was returned to the plaintiff's stable.

The plaintiff's counsel "claimed, as a construction of law, that if the horse was exhausted on his arrival at Dedham, and refused to eat and drink while at Dedham, and was not in a fit condition to drive, the defendant would have no right to drive him back to Attleborough on the same day." And the judge, against the defendant's objection, so instructed the jury.

It was argued by the plaintiff's counsel, that the horse took cold, either at Dedham or when stopping on the return home, by the want of ordinary care on the part of the defendant; and upon this point the judge instructed the jury as follows:

1. "After the horse went into the possession of the defendant, he was bound to take ordinary care, or such care of him as a prudent man takes of his own horse under the same circumstances.

2. "To entitle the plaintiff to recover, he must prove that the death of the horse was produced by the overdriving, or the want of ordinary care on the part of the defendant.

3. "If the death of the horse was produced partly by the misconduct of the defendant and partly by the negligence or misconduct of the plaintiff, the plaintiff is not entitled to recover in this action."

The defendant's counsel requested the judge to instruct the jury "that if they should believe, upon the evidence, that immoderate driving did not of itself alone produce death, but that a cold taken by the horse, or other cause, coöperated with the immoderate driving in producing the death of the horse, the burden is upon the plaintiff to satisfy the jury by a preponderance of evidence, that the second cause existed, or the cold was taken by the horse before he was redelivered to the plaintiff, and that through the negligence of the defendant." But the judge refused to give this instruction.

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The jury returned a verdict for the plaintiff, and the defendant alleged exceptions, which were argued at Taunton at October term 1858.

B. Sanford, for the defendant. The plaintiff, having declared only for an injury to the horse by immoderate driving, is not entitled to a verdict upon the ground that immoderate driving, together with negligence of defendant in taking care of the horse at Dedham, caused his death. *St.* 1852, *c.* 312, §§ 2, 3, 26. *Brown* v. *Wakefield*, 1 Gray, 450. *Woodbury* v. *Jones*, 3 Gray, 262.

The verdict is that the horse died of one of two causes — immoderate driving, or negligence in taking care of the horse — one of which is alleged in the declaration, and the other not; and it does not even appear that the wrongful act alleged was the principal cause. Or the jury may have found, under the second ruling of the court, that the horse died solely from the effects of a cold.

The ruling asked for, as to the burden of proof, was called for by the circumstances of the case, and should have been given *Kellogg* v. *Northampton*, 4 Gray, 68, 69.

E. H. Bennett, for the plaintiff, cited *Bray* v. *Mayne*, Gow, 1, *Briggs* v. *Taylor*, 28 Verm. 180.

Shaw, C. J. A majority of the court are of opinion that the exceptions must be overruled.

1. The first question is this: The plaintiff's counsel claimed, as a construction of law, that if the horse was exhausted on his arrival at Dedham, and refused to eat and drink there, and was not in a fit condition to drive, the defendant would have no right to drive him back to Attleborough on the same day. The court so instructed the jury; to which the defendant excepted.

It appears to us that this direction was right. For, though the allegation in the declaration is immoderate driving only, yet what is immoderate driving depends upon the condition of the horse. What would be very moderate driving of a horse in sound health and good condition, would be immoderate with a horse manifesting plain indications of exhaustion or disease.

2. It was argued by the plaintiff's counsel that the horse did

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take cold either at Dedham or on the return home, by the want of ordinary care of the defendant; whereupon the court instructed the jury:

First. "That after the horse went into the possession of the defendant, he was bound to take ordinary care, or such care as a prudent man takes of his own horse." This was correct, and states the principle in the usual form.

Secondly. "To entitle the plaintiff to recover, he must prove that the death of the horse was produced by the overdriving, or the want of ordinary care on the part of the defendant."

The principal doubt in the case has arisen from this instruction, as applicable to the declaration. The direction was, that the defendant must prove the death of the horse to be caused by overdriving, *or* the want of ordinary care. If this direction had stood alone, it would have been open to the objection, that it would authorize the jury to find a verdict for the plaintiff, if the death of the horse was caused by want of ordinary care alone, although wholly disconnected with any immoderate driving. If so, it would have been wrong, because, in this declaration, immoderate driving was the only cause alleged.

But this direction was given in connection with evidence tending to show that overdriving and the injurious effect of overdriving, upon a horse exhausted and diseased, as this horse appeared to be, and the want of due care of the horse, at Dedham, and in stopping on the way home, for which the defendant was responsible, were the combined and actual cause of his death. The judge did direct the jury, that if the death of the horse was caused, in whole or in part, by the negligence of the plaintiff, after he was returned by the defendant, the plaintiff would not be entitled to recover; and also, that the defendant was responsible for ordinary care of the horse whilst in his possession. Taking the whole charge together, we think the judge intended to direct the jury, that, to entitle the plaintiff to recover, he must prove that the death of the horse was produced either solely by overdriving, or by want of ordinary care combined with, and giving effect to immoderate driving. So understood by the jury, as we think it was, it would not warrant them in

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finding a verdict for the plaintiff on proof of want of ordinary care only, exposing him to a fatal disease, unconnected with immoderate driving.

If the counsel for the defendant understood the direction otherwise, he should have called the attention of the judge, at the time, to the supposed variance between the allegation and the proof, in order that the plaintiff might move to amend his declaration, or, in the absence of such motion, to enable the judge to qualify the proposition stated to the jury, so as to conform to the declaration and the state of the evidence; but no such exception was then taken.

It is very important that no objection to a verdict be brought before this court by an exception which was not in some form taken at the trial, especially in cases where there is ground to believe that if it had been then brought to the attention of the judge and the adverse counsel, it might have been avoided by an amendment, or by a more specific direction of the judge, sustaining or overruling it. The party objecting would have the full benefit of his objection in matter of law, if well founded, either by a ruling in his favor, or an allowance of the exception, and the rights of both parties be secure.

This observation acquires greater weight from the consideration of the very brief and informal mode of declaring and answering, warranted and even required by the new practice act, so different in accuracy and fulness from the pleadings at common law; also that a great part of all trials by jury are, by existing laws, had in the court below, and there is no mode of correcting any error in matter of law, however slight, often not much affecting the general merits of the case, but by setting aside the verdict, and ordering another trial in the same court, at great expense. And it is an act of justice to the judge before whom the trial is had, that his ruling in matter of law, necessarily made in the midst of a trial, should not be reversed, unless his mind was specifically drawn to it, and acted upon it as deliberately as time and circumstances would admit.

Exceptions overruled.

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COMMONWEALTH *vs.* ESSEX COMPANY.

The Essex Company, having made and maintained a fishway in their dam across the Merrimac River, to the satisfaction of the county commissioners, as required by their charter, (*St.* 1845, *c.* 163,) and having duly accepted the act of 1848, *c.* 295, authorizing them to increase their capital stock on condition that they should be liable for all damages occasioned by their dam to the owners of fish rights above it, and having paid large sums of money for such damages, cannot afterwards be required by the legislature, in the exercise of their power to regulate fisheries, to make different fishways; notwithstanding the Rev. Sts. *c.* 44, § 23, reserving to the legislature the right to amend, alter or repeal charters.

INDICTMENT against the Essex Company on the *St.* of 1856, *c.* 289, for neglecting to make and maintain around their dam across the Merrimac River at Lawrence a suitable and sufficient fishway for the usual and unobstructed passage of fish. Trial in the court of common pleas in Middlesex, before *Aiken*, J., who signed this bill of exceptions:

"To sustain the indictment, the Commonwealth offered proof that the defendants have not constructed in or around their dam at said Lawrence fishways which admit of the usual and unobstructed passage of fish, as alleged in the indictment. To the admission of this evidence the defendants objected, as incompetent and immaterial. But it was admitted, subject to objection.

"The defendants then offered to prove the following facts: That the said Essex Company, on the 16th of August 1847, made application to the county commissioners for the county of Essex, requesting them, after due notice and a hearing of all parties interested, to prescribe the mode in which they should construct fishways in their said dam at Lawrence, according to the seventh section of their act of incorporation, *St.* 1845, *c.* 163; that thereupon the said county commissioners appointed the 20th of September 1847, and the town of Lawrence, as the time and place for said hearing, and ordered said company to give notice thereof to all persons and corporations interested therein, by publishing an attested copy of said petition and order thereon in every newspaper published in the towns in

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Middlesex and Essex counties bordering on the Merrimac River, three weeks successively, the last publication to be seven days at least before said September 24th, and also by serving an attested copy of the same on the town clerk of every town in said counties bordering on the Merrimac River, and also by posting up an attested copy thereof in two public places in each of said towns fourteen days at least before said September 24th; that said order was complied with; that on said September 24th 1847 the said commissioners had a public hearing of all parties interested, that said hearing was largely attended, that the respective parties were represented by counsel, and that about twenty witnesses were examined; that, after consideration, the said commissioners subsequently, namely, on the 12th of October 1847, did prescribe the mode in which the said company should construct fishways in their dam, and the same was duly made matter of record; that immediately thereupon the said company did construct fishways in their dam according to the prescription of said commissioners, and to their satisfaction as having been built according to their prescription, and have maintained the same during the period mentioned in the indictment, and that no complaint has ever been made to the commissioners of Essex county that said fishways do not conform to said prescription.

"That immediately upon the passage of the act of 1848, *c.* 295, the Essex Company accepted the same as therein prescribed, increasing their capital stock by the additional sum of $500,000 as therein provided; that, at the passage of said act, the character of said fishways, as not affording a usual and unobstructed passage to fish, was well known, and was brought to the notice of the legislature; that, immediately after the passage of said act, the Essex Company paid, under said act, the sum of about $26,000 to the owners of fish rights above said dam, as damages for hindering or impeding the passage of fish by their said dam with the fishways aforesaid.

"That the Essex Company own, by purchase, the land at and around each end of their dam; that a fishway, securing the usual and unobstructed passage of fish in or around said

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dam, will cost, as variously estimated from $10,000 to $40,000; and that the number of stockholders in said company in the years 1847 and 1848 was about two hundred and fifty, and in 1856 was about three hundred and fifty.

"The Commonwealth objected to the admission of this evidence, on the ground that it was incompetent, and, if admitted, would furnish no legal defence to said indictment. The court ruled that said evidence was incompetent, and that said facts, if proved, would constitute no legal defence to the indictment, and excluded the evidence.

"The defendants offering no further evidence, the court instructed the jury that upon the evidence the Commonwealth was entitled to a verdict, and under this the jury accordingly returned a verdict of guilty. To the admission of the evidence aforesaid introduced by the Commonwealth, and to the rejection of said evidence offered by the defendants, and to the rulings and instructions aforesaid, the defendants excepted."

This case was argued at Cambridge at October term 1858.

R. Choate & E. Merwin, for the defendants.

S. H. Phillips, (Attorney General,) for the Commonwealth The provision of *St.* 1856, *c.* 289, § 1, that the Essex Company should, before the 1st of February 1857, "make and forever thereafter maintain in or around their dam in Lawrence a suitable and sufficient fishway for the usual and unobstructed passage of fish" during five months in the year, was within the constitutional power of the legislature, in the exercise of its superintending care over the fisheries in rivers not navigable; and prescribed no different duty from that imposed upon the company by their charter (*St.* 1845, *c.* 163, § 5) to "make and maintain suitable and reasonable fishways, to be kept open at such seasons as are necessary and usual for the passage of fish." *Commonwealth* v. *Chapin*, 5 Pick. 202. *Commonwealth* v. *Alger*, 7 Cush. 98. *Stoughton* v. *Baker*, 4 Mass. 524. *Briggs* v. *Murdock*, 13 Pick. 305. *Sts.* 1709, *c.* 3; 1741, *cc.* 6, 7; 1743, *c.* 5; 1745, *c.* 2 — Mass. Perp. Laws, (ed. 1759,) 162, 297, 298, 313, 320. *Sts.* 1749, *c.* 4; 1765, *c.* 4 — Mass. Temp. Laws, (ed. 1763,) 67, 235. *Sts.* 1780, *c.* 16, §§ 2, 3; 1783, *c.* 4; 1786, *c.* 11; 1789,

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cc. 5, 8; *c.* 51, § 3; 1790, *c.* 8; 1791, *c.* 30; 1792, *c.* 10; *c.* 62 § 4; *cc.* 78. 88; 1802, *c.* 51; 1803, *c.* 158; 1804, *c.* 134; 1806 *c.* 28; 1811, *c.* 175, § 4; 1819, *c.* 20, § 1; 1846, *c.* 192.

The *St.* of 1848, *c.* 295, gives the company no new right against the public or owners of fish rights above the dam, and cannot be so enlarged by implication as to release the defendants from their obligation to maintain fishways. *Cleaveland* v. *Norton*, 6 Cush. 383. *Vinton* v. *Welsh*, 9 Pick. 92.

If the *St.* of 1856, *c.* 289, imposes a new obligation upon the company, or makes more onerous an existing duty, it is within the power reserved to the legislature by the Rev. Sts. *c.* 44, § 23, by which every act of incorporation passed since the 11th of March 1831 "shall at all times be subject to amendment, alteration or repeal at the pleasure of the legislature." *Crease* v *Babcock*, 23 Pick. 342. *Erie & Northeast Railroad* v. *Casey* 26 Penn. State R. 305. *Commonwealth* v. *Erie & Northeast Railroad*, 27 Penn. State R. 351. *McLaren* v. *Pennington*, 1 Paige, 108.

New and onerous duties, imposed on various corporations by the legislature, serve to illustrate and confirm this. *Sts.* 1853, *c.* 113; *c.* 121; 1851, *c.* 252; 1850, *c.* 308; 1840, *c.* 85; 1841, *c.* 125; 1842, *c.* 22; 1845, *c.* 191; 1849, *cc.* 191, 222; 1854, *c.* 23; 1857, *c.* 291; 1846, *c.* 82. *Roxbury* v. *Boston & Providence Railroad*, 6 Cush. 424. *Massachusetts General Hospital* v. *State Mutual Life Ass. Co.* 4 Gray, 234.

The case of *Commonwealth* v. *New Bedford Bridge*, 2 Gray, 339, is distinguished in principle from this case by the fact, that the charter to the defendants in that case was granted a long time previous to 1831.

This is not a taking of private property for public use. It is rather a modification of the use allowed by law, or the restraining of a certain use which would be beneficial, for the public good; which is not a taking, within the meaning of the constitutional prohibition. *Commonwealth* v. *Tewksbury*, 11 Met. 55. *Stoughton* v. *Baker*, 4 Mass. 524. *Commonwealth* v. *Alger*, 7 Cush. 98. *Suydam* v. *Moore*, 8 Barb. 358.

Section 23 of the Rev. Sts. *c.* 44 is not in contravention of

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the Constitution of the United States, as a law impairing the obligation of contracts. *Crease* v. *Babcock*, 23 Pick. 340. *McLaren* v. *Pennington*, 1 Paige, 108. It is valid on the same ground that state insolvent laws operating *in futuro* are valid — that all contracts made while they are in force are expressly made subject to them. *Ogden* v. *Saunders*, 12 Wheat. 213. *Scribner* v. *Fisher*, 2 Gray, 43.

Shaw, C. J. The Essex Company, the defendants in this case, were indicted in the court of common pleas for a violation of the *St.* of 1856, *c.* 289, requiring that company, before the 1st of February 1857, to make, and forever thereafter maintain, in or around their dam in Lawrence, a suitable and sufficient fishway for the usual and unobstructed passage of fish, under a penalty of not less than $100 nor more than $500 a day for the time they should neglect to make and maintain such fishway after said 1st of February. This act was passed on the 6th of June 1856.

The company, having failed to provide any new fishway after the passage of this act, were indicted for such neglect; and upon trial several grounds of defence were taken, which are set forth in the bill of exceptions. As the several questions substantially resolve themselves into one general consideration of the rights of this company, instead of considering the admissions and rejections of the evidence, and the particular rulings of the court thereon, in detail, it may be more convenient to state the real ground of controversy.

The Essex Company were created a corporation by *St.* 1845, *c.* 163, for the purpose of constructing a dam across Merrimac River, and constructing one or more locks and canals in connection with said dam, for the purpose of creating a water power to use or sell, or lease to other persons or corporations to use, for manufacturing and mechanical purposes, and for constructing a main canal, for navigation or transports. By § 5, the said corporation was required to make and maintain, in the dam so built by them across said river, suitable and reasonable fishways, to be kept open at such seasons as are necessary and usual for the passage of fish. By § 7, they were required to

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build such fishways in the mode prescribed by the county commissioners, after due notice and a public hearing of all parties interested, with power to the commissioners to examine and determine whether the fishways have been built according to such mode prescribed, and, if so, to accept the same.

By an additional act passed in May 1848, the company were authorized to increase their capital stock, but upon an express condition. *St.* 1848, *c.* 295. This condition was, "that said company shall be liable for all damages which shall be occasioned to the owners of fish rights existing above the said company's dam, by the stopping or impeding the passage of fish up and down the Merrimac River by the said dam." An adequate and constitutional mode of assessing these damages was provided by the act, which of course would not be resorted to when such damages should be agreed upon by the owners of such fish rights and the company, and paid. This act contained a further proviso, that nothing contained in the 7th section of the act of incorporation — the section requiring the company to make and maintain fishways — should be deemed to be a bar to such claim for damages. A second section of this act of 1848 provided that the act should take effect whenever the stockholders, at a legal meeting, should accept the provisions of the preceding section, and file an authenticated copy of their vote of acceptance in the office of the secretary of the Commonwealth. It is conceded that such a vote, accepting this act, was duly passed, and an authenticated copy of it filed with the secretary of the Commonwealth soon after the passage of the act. The construction of this statute and the acts done under it by the defendant company will be considered hereafter.

By the above statutes the obligation of the company in preserving the fishway on the Merrimac River, as a consideration and condition of the franchise granted them, was fixed and determined, until the passage of the act eight years after, *St.* 1856, *c.* 289, by which the company were required to make and forever thereafter maintain in or around their dam in Lawrence, a suitable and sufficient fishway for the usual and unobstructed pas-

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sage of fish, during the months of April, May, June, September and October, in every year.

This is the statute upon which this indictment is found, and the question is, whether the company are liable for the heavy penalties therein declared, for neglect of the duty thus prescribed.

In order to ascertain what was done by the company under their act of incorporation, and the additional act above cited, we recur to the bill of exceptions. At the trial the defendants offered to prove, that after the grant of their charter, and whilst their dam was in process of erection, they applied to the county commissioners, who, after ample public notice, and a full hearing of all parties interested, on the 12th of October 1847, prescribed the mode in which said company should construct fishways in their dam, and the same was duly made matter of record; and that thereupon the company did construct fishways in their dam, according to the prescription of said commissioners, and to their satisfaction as having been built according to their prescription, and that they have maintained the same during the time mentioned in the indictment.

The defendants also offered to prove that immediately after the passage of the act of 1848, *c.* 295, they in due form, by a vote recorded, authenticated and transmitted to the secretary of the Commonwealth, accepted the said act, authorizing them to enlarge their capital stock and binding them to pay damages to all proprietors of fish rights above said dam; that at the time of passing said last mentioned act, the character of said fishways, so constructed, as not affording a usual and unobstructed passage to fish, was well known, and was brought to the notice of the legislature; that immediately after the passage of said last act, the defendants paid, under said act, the sum of about $26,000 to various owners of fish rights above said dam, as damage for hindering or impeding the passage of fish by their said dam, with the fishways aforesaid; that a fishway in or around said dam, securing the usual and unobstructed passage of fish would cost, as variously estimated, from $10,000 to $40,000; and that the number of stockholders in said company in 1848

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was about two hundred and fifty, and in 1856 about three hundred and fifty.

This evidence was objected to by the counsel for the prosecution, on the ground that it was incompetent, and, if admitted, would furnish no legal defence; it was so ruled by the court, and the evidence was excluded. The defendants offering no other evidence, the court instructed the jury that upon the evidence the Commonwealth were entitled to a verdict, and accordingly the jury returned a verdict of guilty.

In considering these exceptions, we are to regard the facts, of which proof was thus tendered and rejected, as having the same bearing which they would have had if actually proved.

1. The first question arising upon the construction of these statutes, which must obviously be considered and construed together is, what duty did the statute of 1856 require the defendant company to do?

The expression is, to "make and forever maintain in or around their dam a suitable and sufficient fishway for the usual and unobstructed passage of fish." Construed according to the subject matter, we cannot fail to understand that this provision refers to the migratory fish, which pass, every spring, from the ocean up fresh water rivers to their head waters, to cast their spawn. No one conversant with the legislation of Massachusetts, and who has witnessed the constant anxiety of the government for the salmon, shad and alewives, and in regulating the fisheries of them, can doubt the purpose of this requirement. At this time, the fishways prescribed by the original act, and built as directed, had been in operation; and it appears, by the evidence offered, that after the few first years they had proved insufficient for the purpose. Perhaps it is not too much to presume, from the known natural instinct of these classes of fish to pursue the direct line of the natural current, against all obstacles, that no fishway around the dam would be sufficient. But without any such speculation, the evidence showed that the fishway which they had made and maintained had proved insufficient. Under these circumstances, the law requiring them to make and maintain a sufficient fishway to secure the unobstructed passage

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of fish was in effect requiring them to make a new structure, at whatever cost, which at their peril should be sufficient. It appears by the evidence, that the first cost of such a structure would amount to a sum, variously estimated, from $10,000 to $40,000.

2. The next question is, whether, taken in connection with the other statutes above cited, it was competent for the legislature to impose the obligation, and require the performance of the duties prescribed in said statute, under the penalty therein expressed, and whether this indictment can be maintained for the non-performance of it.

It seems to be well settled that the obstruction of the passage of the annual migratory fish through the rivers and streams of the commonwealth, is not an indictable offence at common law. But the right to have these fish pass up rivers and streams to the head waters thereof is a public right, and subject to regulation by the legislature; though the right to take fish in waters not navigable belongs to the riparian owners of the soil along the shores and banks of such rivers and streams. *Commonwealth* v. *Chapin*, 5 Pick. 199. The liability, therefore, of the defendants to this indictment depends upon the statute.

It is plainly within the province of the legislature to determine and regulate the use of all common and public rights and easements. The rights of navigation on tide waters, and of the use of streams not navigable for boats and rafts, are public, and such rights are subject to regulation. It sometimes happens that the full enjoyment of two public rights would, to some extent, interfere with each other; as where a highway, turnpike or railroad crosses a navigable or boatable stream. It is then for the legislature to determine which shall yield, and to what extent, and whether wholly, or in part only, to the other; and such question will ordinarily be determined by the legislature, according to their conviction of the greater preponderance of public necessity and convenience. The most common case is that where each is required to yield in part, as in the case of a bridge over a navigable river, furnished with a draw, to be raised for the passage of vessels, at the expense of the bridge-owners, or by the navigators

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desiring to pass it, as the legislature may direct. The bridge causes some impediment to the navigation; the raising of the draw causes some impediment to the land passengers. Sometimes a bridge is authorized without a draw, when the navigation is small, as in the case of the bridge over Charles River, between Brighton and Cambridge, and the railroad bridge over Miller's River, between Somerville and Cambridge. Sometimes the legislature have required the bridge-owners to pay a sum to every passing vessel, equal to the damage caused by the impediment. These different provisions serve to illustrate the general principle, that all these public rights are subject to regulation; such regulations will be governed by considerations of their relative value and importance.

The manner in which the public right to free passage of fish up the several rivers and streams has been established and regulated, by the early colonial and provincial laws, as well as by the laws of the Commonwealth, is well established. *Commonwealth* v. *Chapin*, 5 Pick. 199. *Vinton* v. *Welsh*, 9 Pick. 87. In this last case, after citing the case of *Stoughton* v. *Baker*, 4 Mass. 572, and various other cases, Parker, C. J., sums up the result thus: "In the first case cited, it was decided, that the colonial, provincial and constitutional legislatures having exercised the right for the public good, of regulating the fisheries in the several towns, the owners of several fisheries and of dams across rivers, held their property subject to such regulations as the legislature should, from time to time, for the preservation of the fish, prescribe. And that doctrine has been received and acted upon as law, from the time of that decision to the present." 9 Pick. 92.

By the decision in *Stoughton* v. *Baker*, all persons who may build a dam for mill purposes, on a stream annually frequented by fish, do it under an implied obligation to keep open sufficient sluices and fishways for the passage of fish, at the proper season; and further, if a grant is made by the legislature to erect a dam across a river, it is to be construed to be under the same implied condition to keep open fishways, unless such implication is excluded by an express provision exempting them.

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The same principle is recognized in *Vinton* v. *Welsh*, in deciding that an act incorporating the defendant and others to erect reservoir dams, without any provision for fishways, was not a repeal of former laws requiring them, because there was no clause of express repeal, or expressly exempting them from keeping such fishways.

From this view of the law of Massachusetts, we come to the conclusion, that from the earliest times the right of the public to the passage of fish in rivers, and the private rights of riparian proprietors, incident to and dependent on the public right, have been subject to the regulation of the legislature; and the mode adopted by the legislature, whether by public or private acts, to secure and preserve such rights, has been by requiring, in the erection of dams, such sluices and fishways as would enable these migratory fish, according to their known habits and instincts, to pass from the lower to the higher level of the water, occasioned by such dam, so that, although their passage might be somewhat impeded, it would not be essentially obstructed thereby. This was the only remedy, because no private action would lie for the riparian proprietor, and no indictment at common law for the public injury.

3. We are now to consider what are the true construction and operation of the act of incorporation, by which the defendants were constituted and chartered.

All provisions of statute, made for regulating the fisheries, are intended for the public benefit, and all persons, at their peril, must take notice of them; they are therefore public statutes, and the courts of law will, *ex officio*, take notice of them. *Burnham* v. *Webster*, 5 Mass. 266. *Commonwealth* v. *M'Curdy*, 5 Mass. 324.

The objects proposed to be accomplished by the defendants were so far public in their nature, and designed to promote the public benefit, that it was quite competent for the legislature to exercise the power of eminent domain, by authorizing them to take private property when necessary, providing modes by which a full compensation therefor should be made. These objects were to establish a great water power for manufacturing

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and mechanical purposes, and for improving the navigation of the river by locks and canals. *Boston & Roxbury Mill Dam* v *Newman*, 12 Pick. 467. *Hazen* v. *Essex Co.* 12 Cush. 477, 478. The usual provision was made for the assessment and payment of damages, which is made where private property is authorized to be taken for public use.

The usual provision was also made for the preservation of the rights of fishery, both public and private, which have been made in like cases, by requiring the company to make and maintain fishways in said dam, which should be made to the satisfaction of the county commissioners. We believe it has been usual, in such acts of legislation, to delegate an authority to a committee or commissioners, to see that certain provisions are specifically carried into effect; and we have never known the legality of such delegation of power questioned. In the leading case of *Stoughton* v. *Baker*, before cited, it was held that where a certain portion of the things authorized to be done by a committee of three was done by one, to that extent the power was not well executed.

It appears by the facts that the county commissioners did, in due form, prescribe the mode in which fishways should be made, and they were so made, and afterwards maintained, to the time of finding this indictment, in the mode thus prescribed. Under these circumstances, we are strongly inclined to the opinion that the company had performed the condition on which their charter was granted, and would be free from public prosecution. Whether, if the fishways actually provided had proved wholly unfit and inadequate to their purpose, and other measures could be provided within a reasonable cost, which could be shown to be probably effectual, the legislature could, by further legislation, have required the company to construct such other fishways, we give no opinion, for reasons which will appear in our construction of the additional act.

4. In putting a construction upon the additional act, (*St.* 1848, *c.* 295,) it is important to note the date, and the circumstances under which it was passed. At that time the dam had been in operation some time, with the fishway prescribed, and

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proved to be unsuitable or insufficient to accomplish the pro posed purpose of providing for the passage of the fish. It appears that the company required legislative aid to enable them to increase their capital stock. It seems that the legislature seized the opportunity to make a better provision for the security of the fisheries, than that required in the act of incorporation had proved to be. This they did by a scheme to be proposed to the company by way of condition, and acceded to by them in legal form; a scheme entirely different from that proposed in the act of incorporation, and different from any which had been previously adopted in any similar case.

The legislature had the power to regulate the public right, and diminish it or release it, as the best good of the public, on the whole, might in their judgment require. Whether that public good, expected from the fishery, consisted in affording an additional article of food to the people, or an employment for labor, or otherwise, the legislature might well compare this with the public advantage, in affording increased profitable labor and means of subsistence, and various benefits, from building up a large manufacturing town, and decide as the balance of public benefit should preponderate. Of this they must judge. *Boston & Lowell Railroad* v. *Salem & Lowell Railroad*, 2 Gray, 1.

But the legislature stood in a more delicate relation towards the various riparian owners of fish rights above the dam. The extinction of the public right to have the fish pass the dam would deprive these owners of their several fisheries, which were in effect private property. Towards them, therefore, the public stood, in some respects, as trustees, and their beneficial interests could not honorably be disregarded. The plan, therefore, proposed by this enactment, was to substitute, for the public right intended to be provided for by the fishways required, a provision for the payment of damages by the company to every riparian owner of fishing rights along the river above said dam, giving them a remedy against the company where none existed before, for all damages occasioned by the stopping or impeding the passage of fish up and down the Merrimac River by the said dam. It declared that the provision in the

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7th section of the former act, requiring the making and maintaining of such fishways as the county commissioners should prescribe, should not be deemed a bar to such private claim for damages; implying that, but for this clause, such provision for fishways would have been a bar to any private claim for damages. It provides an easy and constitutional mode for every such private owner to obtain his damages, to be used, if the same should not be adjusted and paid by agreement, which each such private owner would have a right to make, in respect to his own several interest. It was the substitution of one onerous duty upon the company for another, more equitably and effectually to accomplish the same object.

To preclude all question as to the right of the legislature thus to impose a new obligation upon the company, it was provided that the act should not take effect until it should be in terms accepted at a meeting of stockholders called for that purpose, and authentic evidence thereof filed in the office of the secretary of the Commonwealth, for the information and benefit of all persons concerned, as well those individual riparian owners who might claim their rights under it, as those persons who might afterwards acquire or hold shares in the stock of said company. This appears to us to be the direct meaning and construction of this enactment. It was not a new provision, requiring the better performance of a preëxisting duty; it was substituting a new species of indemnity to parties, where none in any form existed before, either by an action of tort at common law, or by a claim for damages under any statute.

Under these circumstances, it appears to us, especially after it has been acceded to by the company, and after they have paid a large sum of money in pursuance of it, that this enactment has in it all the elements of a contract, executed by one party and binding on the other.

5. The remaining question is whether the act of 1856 is justified by the provision in the Rev. Sts. *c.* 44, § 23, that acts of incorporation afterwards passed should be subject to amendment, alteration or repeal? That provision is, that every act of incorporation shall at all times be subject to amendment,

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alteration or repeal, at the pleasure of the legislature; provided, that no such act shall be repealed, unless for violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same.

The power of repeal is limited and qualified, and was so considered in the case of *Crease* v. *Babcock*, 23 Pick. 334.

Does this come within the power of the legislature to amend or alter? It seems to us that this power must have some limit, though it is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land for purposes connected with its business; and they purchased such lot from a third party; could the legislature prohibit the company from holding it? If so, in whom should it vest; or could the legislature direct it to revest in the grantor, or escheat to the public; or how otherwise?

Suppose a manufacturing company incorporated is authorized to erect a dam and flow a tract of meadow, and the owners claim gross damages, which are assessed and paid; can the legislature afterwards alter the act of incorporation so as to give to such meadow-owners future annual damages? Perhaps from these extreme cases — for extreme cases are allowable to test a legal principle — the rule to be extracted is this; that where, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.

It appears to us, in the present case, that after the government, acting in behalf of the public, and also of all those riparian owners whose fish rights would be damnified by the defendants' dam, with the fishway as it was, entered into a solemn and formal contract with the defendant company to exempt them from the obligation of making and maintaining a suitable and sufficient fishway, if such were practicable, by indemnifying all parties damnified in their several fisheries, and the defendant company had executed their part of the contract by the payment of a large sum of money, it was not competent for the legislature, without any change of circumstances, under

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their authority to amend and alter the charter of the company, to pass a law requiring them to do the acts from which, by the terms of such contract, they had been exempted, and therefore that the said act was null and void, and this indictment founded upon it cannot be maintained. *Exceptions sustained.*

Thomas Niles *vs.* Isaac Patch.

The declarations of one occupying land under a bond for a deed are admissible in evidence of the boundaries of the land against a stranger, in favor of one who afterwards takes an assignment of the bond from such occupant, and a deed directly from the obligor.

A conveyance of land, "bounded westerly by the beach," does not include the land between high and low water mark.

In an action for breaking and entering a close, the title to which is disputed, a witness, who has testified that he was in the habit of going upon the premises, cannot be asked "what he used to go there for," for the purpose of showing that he and all the neighbors were in the habit of using the land as common property.

In an action of trespass on land, evidence of declarations of a person, who formerly occupied it under a bond for a deed from the defendant, that he did not own the land in dispute, is inadmissible, if that person has not been called as a witness, and no evidence has been introduced that he ever did own the land.

In an action for trespass on land, the testimony of a former occupant, that he had a controversy and suit at law with the defendant concerning the land, is admissible in evidence; and the admission of such testimony as to the settlement of that suit is no ground of exception by a party who did not specify, as his ground of objection, that the record of the suit would be better evidence.

At a town meeting, the town, under an article to see if they would discontinue a town way, voted "to leave it to the discretion of the selectmen;" and at a meeting subsequently called "to see if they would accept the doings of the selectmen in discontinuing the road," the selectmen reported that the way should be discontinued, and the town accepted their report. *Held*, that the way was legally discontinued.

Shaw, C. J. The present case comes before us on a writ of review, sued out by Niles in pursuance of an authority for that purpose granted by this court on his petition. The purpose of this review was to obtain a new trial of an action commenced by the plaintiff against Patch, in which a verdict had been given, and judgment recovered for the defendant for costs. The action has been again tried on the original pleadings before Mr

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Justice Merrick in Essex, and a verdict returned for the plaintiff, to avoid which the defendant has filed a bill of exceptions.

It appears that the declaration was in tort, and contained two counts: 1st. For pulling down, carrying away and converting to his own use a gate and part of a wall, situated and standing across the entrance to and near the northern entrance upon a tract of beach in Gloucester called Long Beach; 2d. For entering the plaintiff's close in Gloucester aforesaid, "bounded and described as follows; namely, northerly by land of said Patch, easterly by other land of said Niles, southerly and southwesterly by the sea," and taking and carrying away seaweed and sand, belonging to the plaintiff, there being, and converting the same to his own use.

By the answer, the defendant denies that he converted to his own use or carried away any gate or wall, the property of the plaintiff; although he admits that, to abate a nuisance, he did take down a certain gate and portion of wall erected by the plaintiff.

By an amended and substituted answer to the second count, the defendant denies that the close is the close of the plaintiff; says that it is his own soil and freehold, and was in his possession, or of those under whom he held, under a claim of right, for more than twenty years before the time of the alleged breaking, and has so continued. He admits that he has taken sand and seaweed from a portion of Long Beach, which he believes to be the close described in the declaration, and says that said sand and seaweed were his own property, and that he rightfully converted the same to his own use, and denies that he ever broke or entered any part of any close of the plaintiff situated in Gloucester.

From these pleadings and the bill of exceptions, it appears that the main question was, whether the plaintiff owned or had exclusive possession of the beach which is the close in question. It is difficult to render the points in controversy intelligible without a knowledge of the localities, derived from plans and surveys. It appears that formerly there was a town way, which had been laid out in 1728, along and over the said beach to the

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farm at Eastern Point owned by the plaintiff; that the gate in question stood on and across said town way, at or near the entrance upon said beach, at the northerly end thereof. It further appears that in 1845 this town way was discontinued, by a vote of the town passed at the request of Niles; but it is denied by the defendant that this was a legal and valid discontinuance, and this is one of the questions presented by the exceptions. From this statement it is manifest that, to maintain his action, the plaintiff must prove title to the *locus* in himself, or exclusive and adverse elder possession; and to establish a justification on the part of the defendant, in support of his plea of soil and freehold in himself, the burden of proof was on him.

It appears by the exceptions, that in 1834 J. P. Cushing owned the farm at Eastern Point, now owned by the plaintiff, and then gave a bond for a deed of the same to Boynton; that Boynton assigned the same to Greenleaf, who held the bond and occupied the farm for some time, and then negotiated for a sale of the farm to the plaintiff; but as the fee still remained in Cushing, his bond to convey, by a mutual arrangement, was cancelled; and the deed was made directly by Cushing to the plaintiff in 1844.

1. The first question arises thus; the plaintiff was examined as to his exclusive possession, and, in the course of his examination, he was asked by his counsel "whether, when he purchased said farm, Greenleaf had pointed out to him the limits of the farm, and, if so, what those limits were." This was objected to, but admitted. The objection seems to have been that it was hearsay, and not under oath; and further, that all such representations must be considered as merged in the deed subsequently given.

We are of opinion that the evidence was of very little importance, especially as Greenleaf was afterwards called and testified fully. But it seems to us not to have been incompetent. Greenleaf was in possession several years under an equitable title. But that possession was absolute and exclusive whilst it continued. The declaration of a tenant, whilst in pos-

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session, is a verbal act, qualifying the act of possession, and has some tendency, often very small, to prove the bounds and limits of his possession.

As to its being part of a negotiation which terminated in the execution of a deed, the technical answer is, that the deed was not given by Greenleaf, but by Cushing; and Greenleaf stood in the relation of a prior party, in possession, making a declaration as to the nature and limits of his possession, whilst it lasted, and his declaration was not a part of the negotiation merged in the deed.

2. The next question turns upon the answer of the defendant, by which he proposes to justify the act of breaking and entering the close, consisting of the tract of beach over which the tide ebbs and flows, by proving soil and freehold in himself. For this purpose, he gave in evidence a deed from Giles to himself, referring for description to a deed from Wonson to Giles, in which the land is thus described: "The fourth tract of said land is bounded westerly by the beach, northerly by land of said James Pearson deceased, easterly by the same, and southerly by land belonging to the estate of Daniel Rogers deceased."

The body of the tract thus described is easterly of the Long Beach, and the question is, whether, by making the beach a westerly boundary, without any other expression in the context or in any other part of the deed, such a description includes the beach. "Beach," in its ordinary signification, when applied to a place on tide waters, means the space between ordinary high and low water mark, or the space over which the tide usually ebbs and flows. It is a term not more significant of a sea margin, than "shore;" and bounding "on the shore" does not include the shore. *Storer* v. *Freeman*, 6 Mass. 435 Had the term been "sea," or "salt water," or "bay or harbor," it might have brought the grant within the operation of the colony ordinance, and carried the beach or flats, if the grantor owned it. We would not say that there might not be such terms in the deed, as, connected with the term "beach," would indicate an intent to include the beach; and such intent, if anywhere

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manifest in the deed, would govern its construction and convey the beach. But in this deed there is no such qualification, and therefore the court are of opinion that the defendant did not acquire by it a title in fee in the beach. *Doane* v. *Willcutt*, 5 Gray, 328.

3. One Story, a witness called by the defendant, who had stated that he was in the habit of going upon the *locus*, was asked what he used to go there for — with a view to show that he, as one of the neighbors, had been in the habit of going upon the beach for the purpose of taking sand and seaweed, when he thought fit. This question was objected to and not admitted.

The purpose for which the question was put, as above stated, does not appear to have been stated at the time; nor if he had such intention, that he did anything; it was an inquiry as to his mere naked and secret intention. As such, we think it was rightly rejected. Had the question been of acts done, of his taking sand and seaweed, then it might have been proper to ask in what manner, whether with or without a team, openly or covertly, often or rarely, with or without notice to any persons and to whom, indicating whether or not these acts were done under any adverse claim or claim of right, and it would have presented the question of admissibility in a very different aspect.

4. Another exception is thus stated: "The defendant introduced one Small as a witness, and proposed to show by him that Greenleaf, while in the occupation of the farm, had told him (Small) that he did not own that portion of the beach which was in dispute. This was objected to by the plaintiff and the objection was sustained. But," as the bill of exceptions goes on to state, "this objection was made before Greenleaf had been called as a witness, and before any evidence of his possession of this part of the farm had been offered by the plaintiff.

"At a subsequent stage of the trial, Greenleaf was called as a witness, and testified, in substance, that he occupied the *locus* several years as part of the farm, and had exclusive possession of it; that he had a controversy with Patch concerning

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it, and brought an action against him for trespassing upon it by taking sand and seaweed therefrom, and that suit was settled upon Patch's giving him a release of all claim to the *locus;* and that Patch never afterwards did anything thereon, or claimed any right thereto, to his knowledge."

As to the exception, that the testimony of Small ought to have been admitted, we are of opinion that the rejection was right. It could not be admissible to contradict Greenleaf, for Greenleaf had not then testified; nor was it again offered after Greenleaf had testified.

It could not be admitted to contradict the plaintiff, for several reasons: 1st. It did not contradict him. The plaintiff testified that Greenleaf, when in possession, had pointed out the bounds; the evidence offered was, that he said he never owned the land. These were not contradictory; he had no legal title, and, in strictness, did not own any part of the estate. 2d. The declaration of Greenleaf, testified of by the plaintiff, was made at a different time from that offered to be given in evidence. 3d. If it became material in consequence of the testimony afterwards given by Greenleaf, Small should have been recalled.

As to the testimony actually given by Greenleaf, of the controversy with Patch, and the suit and settlement of it, the fact of the controversy with Patch was competent, as the acts and declarations of the party to the suit, offered by the adverse party, by way of admission or confession. As to what he testified respecting a suit at law, and the settlement of it, if it had been objected to on the ground that it was not the best evidence, and that the record ought to be produced, it would perhaps have been a good objection to the *viva voce* testimony on the point; but no such objection was made.

5. Another exception turns upon the question whether the town way over Long Beach had been legally discontinued. The court ruled that it had been, and to this the defendant excepted. From the records of the proceedings of the town of Gloucester, it appears that in April 1845 Niles applied to the selectmen to insert an article, in the warrant for a town meeting, to act upon the petition of said Niles, requesting the town

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either to repair the said town way or discontinue it. This article was inserted accordingly: "To hear the request of Thomas Niles, asking the town to repair the road on Eastern Point from the north end of the beach to his house, or to discontinue the same as a town's road." At the meeting held pursuant to said warrant, it was voted "to leave it to the discretion of the selectmen."

For the ensuing meeting in June, an article was inserted in the warrant "to see if the town will accept the doings of the selectmen, in discontinuing the road on Eastern Point, from the gate at the north end of Long Beach southerly to the dwelling house of Thomas Niles, agreeably to his petition." At the meeting, the selectmen made their report, reciting that, having viewed the premises and given notice to all parties interested, they were of opinion that public necessity and convenience did not require the road, and recommended that it be discontinued as a town way. At the same meeting, on this article, by the vote of the town, the report of the selectmen was accepted.

The court are of opinion that this was a regular discontinuance of the way from the gate at the north end of the beach to Niles's house southerly. By the Rev. Sts. *c.* 24, § 70, "any town, at any meeting regularly called for that purpose, may discontinue any town way or private way."

It was objected in the argument, that selectmen cannot initiate proceedings for the discontinuance of a town way. Whatever might be the force of this argument, if founded in fact, is immaterial; the selectmen did not initiate these proceedings; it was done by a petition to the town, and a vote thereon by the town to leave it to the discretion of the selectmen.

The next meeting was called by warrant of the selectmen, among other things, to see if the town will accept the doings of the selectmen, in discontinuing the road. At the meeting held pursuant to this warrant, on taking up this article, the report of the selectmen was accepted.

Here the meeting was called for the purpose of determining whether the way should be discontinued, and the statute in that respect was complied with.

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The selectmen had been invested with full discretionary power to act; they decided, as far as in their power, that the road was not of common convenience and necessity, and recommended its discontinuance. These "doings" were expressed in their report; under the notice in the warrant, the vote was an affirmance of their doings and a discontinuance of the way.

The only question, we thought, which could be raised was, whether, in strict parliamentary law, that is, the general law of usage governing aggregate deliberative bodies, the acceptance of the report of a committee is an affirmance, by the constituent body, of the matters contained in it, or an act giving effect to all the measures proposed by it to be done. But when a matter is referred to a committee, especially when such committee is a recognized, permanent department of such corporation, like selectmen, directors, &c., with authority to take or propose some definite action on the subject, and they make a report proposing such definite action, without reporting any separate vote or resolution, for more effectually carrying the proposed measure into effect, a vote of the body, accepting such report, is of itself an adoption and execution of the measure proposed on the part of the constituent body. And we think such has been generally the understanding and practice of corporations, and aggregate bodies generally, in which the will and power of the body are ascertained and exercised by vote, and especially of municipal corporations. See Cushing's Manual, § 295.

But however this may be, as a general rule, we think the proceedings in this case were peculiar; and taking the petition, the reference with discretionary power, the report and the warrants, the plain and natural construction of the vote of the town was, to accept the doings of the selectmen in discontinuing the way definitely described, in other words a vote to discontinue the way. Such being the intent and effect of the vote of the town, the way was thereby legally and effectually discontinued.

Exceptions overruled.

S. H. Phillips & J. A. Gillis, for the defendant.

O. P. Lord, for the plaintiff.

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Sally Newhall *vs.* Benjamin Ireson, Jr.

A boundary in a deed of land, "beginning at the northeast corner of land of J. S., and thence running southerly upon a brook to a creek, and thence running easterly across the said creek six poles to a stake," and by various courses and distances to the first mentioned bound, passes the land to the thread of the brook only.

Shaw, C. J. This is a real action brought to recover a small undivided part of a very narrow strip of land, constituting one half of the bed of a brook in Lynn, sometimes called Chocolate Mill Brook. The question depends upon the construction of a deed from Joseph Ballard to Thomas Newhall in 1778, and upon evidence offered to give effect and operation to the descriptive part of the deed; also evidence to show what was intended by the descriptive words, and by other deeds, prior and subsequent, in which the same bound is referred to in conveyances of the same land, either separately or in connection with other land; also evidence of possession, adverse and continued, long enough to establish a title by prescription.

By agreement the case was submitted to the court upon a mass of testimony and documentary evidence, with liberty to draw any such inferences as a jury might do, and with authority, according to the result, to enter a judgment for the demandant or the tenant. The case was argued at the last November term in Essex.

There is scarcely any question of law involved in the case, and the facts depend so much upon localities, that it is not easy to make them intelligible without surveys and plans; nor is it necessary to do so. The demandant, through various mesne conveyances, claims title to the same estate which was conveyed by Ballard to Thomas Newhall, which, we believe, is not controverted. Under this title she claims the entire bed of the brook; whereas the tenant denies this claim, and maintains that she is entitled to the soil under the brook, to the extent of the centre of the stream only, *ad filum aquæ*.

The descriptive part of the deed in question is thus: "Begin

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ning at the northeast corner of land belonging to the heirs of Captain Jacob Newhall, deceased, and from thence running southerly upon a brook to Jenks's Creek, and from thence running easterly across the said creek six poles to a stake," and by various courses and distances "to the first mentioned bound." Jenks's Creek is a salt water creek, in which the brook in question discharges itself, and finds its outlet in Saugus River, an arm of the sea.

The court are of opinion that this description, bounding on the brook, in the absence of other words to control or modify the natural and legal effect of such description, carried the grant to the centre of the brook only, and did not include the entire bed of the brook. In some of the earlier deeds this brook is described as a stream dividing the land from that on the other side. We say the natural construction, the construction most likely to conform to the intent of the parties, because such division would be most beneficial to both parties, by affording to both a watering place for cattle, the use of the water for irrigation and other useful purposes. And this rule is also the legal one, because it is well established by principle and authority. *Lunt* v. *Holland*, 14 Mass. 151. *Knight* v. *Wilder*, 2 Cush. 210. 2 Cruise Dig. (Greenl. ed.) tit. 32, *c.* 21, § 31, *note*.

There is nothing in this deed to control this result. One circumstance that might be supposed to have a contrary tendency is, that it begins at a corner of another man's land. But if that man's land bounds on the brook, as it must, the strong probability is that he held by a like conveyance, as bounded on the brook, and then his corner would be in the centre of the brook.

One other circumstance which at first attracted our attention is, that in tracing the boundary down the brook to the creek it says "thence across the said creek six poles." Had it been across the brook, as it first appeared to be, it would have seemed that the whole bed of the brook was included, making the opposite bank from the land granted the boundary line. But it is after the brook has terminated at the creek, thence across the creek, which is quite consistent with the line running down the middle

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of the brook, from the starting point to its termination in the creek. We therefore apply the general rule, that this boundary carried the grant only to the middle of the brook.

We have examined and considered the evidence *aliunde*, and we find no fact to alter or vary the construction of this deed, either giving a different meaning and effect to the descriptive words, or establishing a title by prescription, that is by exclusive, adverse and uninterrupted possession, occupation and enjoyment necessary to constitute a title by prescription.

Demandant nonsuit.

O. P. Lord, for the demandant.

D. Peabody, (*S. H. Phillips* with him,) for the tenant.

William Little *vs.* Sarah A. Little.

The appointment by the court, under Rev. Sts. *c.* 76, § 18, of a guardian *ad litem* for a respondent to a libel, on the ground of insanity, is *prima facie* evidence of the respondent's insanity in any subsequent stage of the cause.

On the trial of a libel to annul a marriage, one party cannot be admitted as a witness under *St.* 1857, *c.* 305, § 1, if the other is insane.

Libel filed in October 1854, for a decree declaring the nullity of a marriage contracted between the parties in October 1853, on the ground of the respondent's insanity at that time. At April term 1858 the respondent, by a guardian *ad litem* appointed by the court on the ground of her insanity, answered, denying that she was insane at the time of the marriage. Trial by jury, and verdict for the libellant, at the same term, before the chief justice, who made a report of the case, the material part of which was as follows:

"On proceeding to the evidence, the libellant offered his own testimony under the authority of *St.* 1857, *c.* 305, authorizing parties to be witnesses in certain cases. This was objected to, on the ground that the case is within the exception to the statute; it was relied on in support of the objection, that the matter in controversy is the validity of the marriage, which is a contract

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or in the nature of a contract, and therefore within the true intent and construction, that if one of the parties to such contract is dead or insane at the time of the trial, so as to be incapable of testifying, then the other party, surviving or continuing of sound mind, shall not be permitted to testify; and that the fact that the respondent is alleged in the libel to be insane, and is defending here by guardian, is such proof of her insanity, that on that ground the testimony of the libellant, the other party, ought not to be admitted.

"Without expressing an opinion upon the question, whether the subject matter of this controversy is a contract within the true construction of the statute — a point not necessary to be decided until it is shown that she is now insane and incapable of testifying — I ruled that the fact, that the libel alleges her to have been of unsound mind at the time of the marriage, and that she defends this suit by a guardian, is not sufficient evidence that she is now insane and incapable of testifying, to warrant and require the exclusion of the libellant as a witness.

"The counsel for the respondent declining to offer any other evidence of her present insanity, the libellant was admitted as a witness.

"Both of these questions; namely, 1st. Whether the subject matter is a contract within the meaning of the statute; and 2d. Whether the evidence of her present insanity was such as to exclude the libellant, are reserved, by request of the respondent, for the consideration of the whole court."

The case was argued at November term 1858 in Essex.

S. H. Phillips & J. A. Gillis, for the respondent.

O. P. Lord, for the libellant.

Bigelow, J. The appointment of a guardian *ad litem* to appear and answer for the respondent necessarily presupposes that in a previous stage of the case her mental condition and capacity had been inquired into and the fact of her insanity during the pendency of the suit duly ascertained and adjudicated. Formerly the power to appoint a guardian in such cases was not exercised by the court; but upon suggestion that the respondent was insane, the party prosecuting the libel, as preliminary to a

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hearing on the merits, was required to procure the appointment of a guardian in the probate court. *Mansfield* v. *Mansfield*, 13 Mass. 412. By the Rev. Sts. *c.* 76, § 18, it is provided that "if the respondent is insane, at any time during the pendency of the suit, the court shall appoint some suitable person as a guardian." This provision clearly requires the court to determine judicially the fact of the insanity of the respondent, as a condition precedent to the exercise of the authority to appoint a guardian *ad litem*. Such determination is in the nature of an interlocutory decree or judgment in the case. It establishes the fact of the existence of insanity in the respondent during the pendency of the suit, and, being the judgment of a competent tribunal on the question, it is *prima facie* evidence of the fact in any subsequent stage of the case. Besides, insanity, when once proved, is presumed to continue unless it was accidental or temporary in its nature, which is not alleged to be in the present case. *Stone* v. *Damon*, 12 Mass. 488. *Breed* v. *Pratt*, 18 Pick. 115. *Hix* v. *Whittemore*, 4 Met. 545.

As the case stood, therefore, when the libellant offered to testify, the presumption was that the respondent was still insane, and in the absence of proof to the contrary on the part of the libellant, he was not a competent witness, if the case falls within the exception to St. 1857, *c.* 305, § 1, which provides that when one of the original parties to the contract or cause of action then in issue and on trial is shown to the court to be insane, the other party shall not be admitted to testify in his own favor.

There would seem to be no room for doubt that the case at bar falls within this exception. Whatever question or controversy may exist among legal writers and jurists concerning the nature of the relation subsisting between husband and wife after marriage — whether the rights and liabilities of the parties are then to be regulated and governed by the principles applicable to all civil contracts, or the contract is to be considered as merged in the higher nature of the status created by the agreement of the parties — all the authorities concur in the conclusion that marriage has its origin and foundation in a purely civil

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contract. 2 Kent Com. (6th ed.) 76, 86. Shelf. Mar. & Div. 1. *Edmonstone's case*, Ferguson, 397–399. *Milford* v. *Worcester*, 7 Mass. 52. *Smith* v. *Smith*, *ante*, 210. The whole object of the present suit was to annul and cause to be declared void that contract, which the parties had in form and according to legal usage assented to, upon the ground that the respondent was wanting in capacity to enter into a valid contract at the time the marriage ceremony was solemnized. The existence and validity of the contract was directly "in issue and on trial." The case was therefore within the express words of the statute. It was also within its spirit. The object of this clause in the statute was to prevent the gross injustice of allowing one party to a suit to testify to facts equally within the knowledge of both, when the other party was incapacitated from giving testimony in a court of justice.

For these reasons, a majority of the court are of opinion that the libellant was not a competent witness and his evidence should not have been received at the trial. *Verdict set aside.*

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF BERKSHIRE, AT LENOX, SEPTEMBER TERM 1859.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. THERON METCALF,
HON. GEORGE T. BIGELOW,
HON. PLINY MERRICK,
HON. EBENEZER R. HOAR
} JUSTICES.

GEORGE C. BUCK *vs.* JOHN C. WOLCOTT & others.

A judgment of the court of common pleas, under the Rev. Sts. c. 103, § 81, confirming a report of commissioners appointed to make partition, is not within the *St.* of 1840, c. 87, prohibiting appeals except for matter of law apparent on the face of the record; but is subject to a general appeal to this court.

Under the *St.* of 1859, c. 196, this court, at a law term, has no jurisdiction of matters cognizable by a single judge.

APPEAL from a judgment of the court of common pleas at October term 1858, confirming a report of commissioners to make partition of real estate, and overruling the respondents' objections, some of which were based on partiality and interest of the commissioners, and others on matters of law. The appeal was entered in this court at May term 1859, and continued to this term.

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H. L. Dawes, for the petitioner. Since the *St.* of 1840, *c.* 87, § 5, no appeal lies under the Rev. Sts. *c.* 103, § 31, except for matter of law apparent on the face of the record. And such is the construction of the commissioners on the pending revision of the statutes in *c.* 136, § 30 of their report. If the judgment of the court below was founded on erroneous rulings in matters of law, not apparent on the record, the remedy is by exceptions.

If any appeal lies on matters not appearing on the record, it is not open at this law term, but must be continued to the next *nisi prius* term of this court.

J. C. Wolcott, for the appellants.

SHAW, C. J. It is not doubted that an appeal would lie in this case, under the Rev. Sts. *c.* 103, § 31, if no change had been made by the jurisdiction act of 1840, *c.* 87. The question is, whether a petition for partition, not being, strictly speaking, a real action, nor expressly provided for in that act, is to be considered as within its operation. The legislature, two years later, very clearly expressed an intention not to consider petitions for partition as real actions, by providing that they might be brought in the court of common pleas, and confirming, as far as they could, all such proceedings in that court since the act of 1840. *St.* 1842, *c.* 4.

The court are of opinion that this case is not affected by the jurisdiction act of 1840, and that this appeal was rightly taken, and was pending in the supreme judicial court, when the act of 1859, *c.* 196, was passed. But it was pending here, not as a question of law, but upon the acceptance of the report of the commissioners, which might involve questions of fact as well as questions of law. There are many cases, requiring the exercise of judicial discretion, in which the court may have to examine facts. This case is like an appeal from a decree of partition in the probate court. It stands upon the docket of this court, and will come up at the next term held by a single judge in this county; for, under the provisions of the act establishing the superior court, this court at a law term has no jurisdiction of matters which have not become questions of law ready for the action of the whole court, and have been entered, or are in

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a condition in which they ought to be entered, upon the law docket. A general appeal is cognizable in the first instance by a single judge. If, at the hearing before one judge, no question of law arises in the case, his judgment will be final. If such question does arise, it may be reserved on report, or by bill of exceptions. *Case discharged from law docket.*

DANIEL H. CRAIG *vs.* FREDERICK N. GISBORNE.

Leaving a summons in the berth of a defendant, in a vessel in which he has taken passage and lies concealed, is no service of a writ.

ACTION OF TORT. The officer made this return upon the writ: "Suffolk, ss. April 25, 1859. By virtue of this writ, I have made diligent search for the within named Frederick N. Gisborne, but could neither find him nor any last and usual place of abode of his in my precinct, except on board of the steamer bound for Liverpool via Halifax, where he had taken passage, and was then hid away in some part of said steamer. I therefore attached a chip as the property of said Gisborne, and left him a summons in his berth on board of said steamer, for his appearance to answer as within directed."

In the court of common pleas, the plaintiff moved for a default. But *Bishop*, J. ruled that the service was insufficient, and that the court had no jurisdiction. To this ruling the plaintiff excepted.

J. E. Field, for the plaintiff.

No counsel appeared for the defendant.

HOAR, J. There was no service of the writ in any manner authorized by law. The officer returns that he found no last and usual place of abode of the defendant; and the defendant's berth in a steamer in which he had taken passage is clearly not such. There was no personal service, and the fact that he was hidden in the steamer is no reason for substituting for personal service the leaving of a copy where he might find it.

Exceptions overruled.

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LELAND J. BURLINGHAM *vs.* ISAAC S. COLE & Trustees.

After the discharge, by agreement with the plaintiff, of the trustees summoned in a process of foreign attachment, the defendant in which resides out of the Commonwealth, and has not been served with process, the court has no jurisdiction to order further service; but the action must be dismissed.

TRUSTEE PROCESS. The defendant was described in the writ as of Davenport in the State of Iowa, and as late of Cheshire in this county. The only service of the writ was upon the alleged trustees, who resided in this county; and the officer returned that he had made diligent search for the defendant and his last and usual place of abode, but could find neither within his precinct. In the court of common pleas, the trustees were discharged by agreement with the plaintiff. The defendant, having appeared specially, moved to dismiss the action for want of service; and the plaintiff moved the court to order a further service. *Bishop*, J. overruled the plaintiff's motion, and granted the motion of the defendant. The plaintiff alleged exceptions.

J. C. Wolcott, for the plaintiff, cited Rev. Sts. *c.* 90, §§ 44, 45, 53; *c.* 92, §§ 3, 4; *Wright* v. *Oakley*, 5 Met. 400.

No counsel appeared for the defendant.

METCALF, J. There being no effectual attachment of the defendant's property, and he not having any last and usual place of abode within the Commonwealth, the court has no jurisdiction of the action, and it must be dismissed. Rev. Sts. *c.* 90 § 44. *Exceptions overruled.*

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Anna Brown *vs.* Charles Kendall.

An action on the Rev. Sts. c. 104, commenced by one who has only a life estate in the land sought to be recovered, is abated by his death.

Action on the Rev. Sts. *c.* 104, to recover land in which the plaintiff had an estate for life only. After verdict for the defendant in the court of common pleas, and pending exceptions taken by the plaintiff, she died, and her administrator was summoned in at the suggestion of the defendant, and undertook the prosecution of the suit.

L. H. Gamwell, for the plaintiff.

J. D. Colt, for the defendant.

Metcalf, J. The original complainant had only a life estate in the land of which she sought possession by this process. Upon her death, neither her heirs nor her administrator had any interest in the land or the possession of it. Of course, the process abated by her death, and did not survive to her administrator. See *Ferrin* v. *Kenney*, 10 Met. 294. The case is to be dismissed from the docket, without costs to either party.

John Price *vs.* Henry P. Weaver.

A declaration on an agreement within the statute of frauds need not allege that the agreement is in writing.

Action of contract. "And the plaintiff says that one William Field owed him the sum of sixteen dollars for services rendered and labor performed by the plaintiff for said Field, and that the plaintiff was about to sue said Field therefor, and that the defendant, in consideration that the plaintiff would forbear to sue the said Field, promised and agreed to pay the same to

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the plaintiff, and the plaintiff did forbear to sue the said Field, and the defendant owes him the said sum."

The defendant demurred to the declaration, and assigned this cause of demurrer: "That the defendant's promise was void, as within the statute of frauds, it being to answer for the debt or default of another, and no agreement in writing or memorandum thereof was ever made or signed by the defendant, nor is any copy of any agreement set out by the plaintiff in his declaration." The court of common pleas overruled the demurrer, and the defendant appealed.

A. Potter, for the defendant. The promise of the defendant was to pay the debt of another, and, not being in writing, was void by the statute of frauds. Rev. Sts. *c.* 74, § 1. *Nelson* v. *Boynton*, 3 Met. 396. *Curtis* v. *Brown*, 5 Cush. 491. *Loomis* v. *Newhall*, 15 Pick. 166. *Stone* v. *Symmes*, 18 Pick. 467. A mere forbearance to sue, or the giving of further time to the debtor, is not such a new consideration as will take the promise out of the statute. *Allen* v. *Thompson*, 10 N. H. 32. *Hilton* v. *Dinsmore*, 21 Maine, 410. *Nelson* v. *Boynton*, 3 Met. 396. *Kirkham* v. *Marter*, 2 B. & Ald. 613. *Caperton* v. *Gray*, 4 Yerg. 563. Nor is it sufficient to prevent the operation of the statute, that the plaintiff has relinquished an advantage or given up a lien in consequence of the defendant's promise. *Fish* v. *Hutchinson*, 2 Wils. 94. *Jackson* v. *Rayner*, 12 Johns. 291. *Nelson* v *Boynton*, and *Curtis* v. *Brown*, above cited.

It appearing on the face of the papers that the promise is within the statute, it may be taken advantage of by demurrer. *Walker* v. *Locke*, 5 Cush. 90. *Tomlinson* v. *Gell*, 6 Ad. & El. 564. *Jones* v. *Ashburnham*, 4 East, 455. *Read* v. *Nash*, 1 Wils. 305.

No counsel appeared for the plaintiff.

Metcalf, J. As this demurrer contains a traverse or denial of facts, it is wrong in form. But we do not overrule it for that reason. We treat it, as the counsel for the defendant treated it, namely, as a demurrer because the declaration, though it sets forth an agreement which is within the statute of frauds, does not allege that the agreement was in writing. This, however, is not a legal cause for demurrer. The statute of frauds has not

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altered the rules of pleading, in law or equity. A declaration on a promise which, though oral only, was valid by the common law, may be declared on in the same manner, since the statute, as it might have been before. The writing is matter of proof, and not of allegation. 1 Saund. 276, *note* (2). Steph. Pl. (1st Amer. ed.) 376. Browne on St. of Frauds, § 505. And this rule of pleading is not changed by the practice act of 1852. We must therefore overrule the demurrer. If the defendant shall hereafter rightly answer and go to trial, he will prevail, unless the plaintiff shall prove that the agreement declared on was in writing, and was signed as the statute of frauds (Rev. Sts. c. 74, § 1) requires. *Demurrer overruled.*

MARY CANFIELD *vs.* LUKE B. MILLER.

In an action on a judgment, a declaration which sets forth the recovery of the judgment, an issue of execution, and an acknowledgment of satisfaction by receipt of a note for the amount thereof, and that the note was by mistake written for a smaller sum than the amount of the execution, and that the judgment to that extent is unsatisfied, shows a good cause of action for the unsatisfied part of the judgment.

Under an answer averring payment by note, evidence of payment in money, or by a check, is inadmissible.

Nonjoinder of a defendant in an action of contract is matter of abatement only.

ACTION OF CONTRACT on a judgment of the court of common pleas. The declaration, after setting forth the recovery of the judgment for the sum of $220, damages and costs, against the defendant and William A. Forbes, averred that it remained in full force and unsatisfied in part, to wit, for the sum of $100 and interest, although an execution had been issued, and duly returned, with an indorsement thereon by the plaintiff's attorney, acknowledging the receipt, by direction of the plaintiff, of a note for the amount thereof; that said note was by mistake written for one hundred dollars less than the amount of the execution, and that sum and interest were still due and unpaid; and that since said judgment, Forbes had applied for the benefit

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of the insolvent laws, and obtained a certificate of discharge, and therefore was not made a joint defendant in this action.

The defendant demurred, because the declaration did not state a legal cause of action, but showed on its face that the plaintiff had, in this form of action, no legal claim against the defendant; and his counsel contended that the plaintiff's remedy, if any, was in equity.

In the court of common pleas, *Sanger*, J. sustained the demurrer; and the plaintiff alleged exceptions, which were argued and passed upon by the court at September term 1857.

C. N. Emerson, for the defendant, cited *St.* 1856, *c.* 38; 1 Story on Eq. § 167; *East India Co.* v. *Donald*, 9 Ves. 275; *East India Co.* v. *Neave*, 5 Ves. 173; *Master* v. *Miller*, 4 T. R. 320; Chit. Bills, (10th Amer. ed.) 184; *Alner* v. *George*, 1 Camp. 392; *Cumber* v. *Wane*, 1 Stra. 426, and notes thereto in 1 Smith Lead. Cas.

B. Palmer, for the plaintiff, cited *Gooch* v. *Atkins*, 14 Mass. 378; *Tate* v. *Anderson*, 9 Mass. 92.

By the Court. The averment in the declaration, as to the acknowledgment of satisfaction on the execution, was unnecessary. If such acknowledgment of satisfaction had been pleaded by the defendant, the plaintiff might then have replied and proved the mistake. But taking together all the averments in the declaration, (the truth of which is admitted by the demurrer,) it sufficiently shows that full satisfaction was acknowledged by mistake; and for that portion of the judgment which remains unsatisfied, this action may well be maintained.

Demurrer overruled, and case remitted to court of common pleas.

The defendant then filed an answer, in which he denied all the allegations in the declaration; and alleged that, if the plaintiff should prove the issuing of any execution as alleged, the defendant gave a note in satisfaction of the alleged judgment and execution to the plaintiff's attorney, who received the same in satisfaction of the execution.

A trial was had in the court of common pleas at October term 1858, before *Bishop*, J., who, after verdict for the plaintiff,

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signed a bill of exceptions, the material part of which is stated in the opinion.

I. Sumner & J. E. Field, for the defendant.

M. Wilcox, for the plaintiff

HOAR, J. The exception to the rejection of the defendant's evidence that, at the time of giving the note to the plaintiff's attorney, he also gave him, for the residue of the judgment, some money and a check, which had since been paid, cannot prevail, because the defendant has not set forth in his answer any other payment than a payment by note. The evidence offered did not tend to prove any fact at issue between the parties.

The remaining exceptions are all taken to the exclusion of evidence which the defendant offered in order to show that William A. Forbes should have been joined with him as a co-defendant in the action, or to evidence offered by the plaintiff to prove the reason which he had assigned in his declaration for not joining Forbes as a defendant. Without considering in detail the several rulings of the judge who tried the cause, or giving any decision upon them, we find an answer to the exceptions, which is in our judgment conclusive. To what issue was all this evidence applicable? If to any, certainly to the issue whether Forbes should have been joined as a defendant. This is not an issue which would determine any matter in bar. If it were found that he should have been joined, it would be no bar to the plaintiff's action, but would only abate his writ. The judgment of the court, if such an issue were found for the defendant, could only be that the writ abate. But, in the first place, there was no answer in abatement, according to the provisions of the practice act, filed in the case, to raise such an issue; and secondly, no exceptions lie to the decisions of the court of common pleas upon pleas in abatement, so that, if this answer could be construed as an answer in abatement, the judgment upon it is not the subject of exception.

Exceptions overruled.

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George C. Hubbell *vs.* John S. Flint.

action can be maintained on a note given for the price of liquors sold by the plaintiff to the defendant, the plaintiff knowing that they were to be resold in violation of law, and assisting the defendant in that unlawful purpose.

an action upon a promissory note, evidence that the consideration of the note was intoxicating liquor sold by the plaintiff to the defendant, for the purpose of being resold in this commonwealth in violation of law, the plaintiff knowing and aiding in this purpose, is admissible under an answer which alleges that the note was "in payment and compensation for liquors sold in violation of law, and received by the plaintiff without consideration, and against law, equity and good conscience, and no action ought to be maintained thereon; and that the note being given for intoxicating liquors sold in violation of all law, whether in this or any other state, an action thereon is an action for the recovery of the value of intoxicating liquors so sold as aforesaid, and cannot and ought not to be maintained in any court in this commonwealth, such note being not in accordance with the provisions of the *St.* of 1852, *c.* 322."

In an action on a promissory note, in which the defence relied upon is that it was given for intoxicating liquors to be resold, as the plaintiff knew and aided in effecting, in violation of law, bills for intoxicating liquors previously sold by the plaintiff to the defendant, though not shown to be the liquors which were the consideration of the note in suit, are admissible in evidence to show the course of dealing between the parties, in connection with the plaintiff's knowledge that the defendant was a dealer in liquors.

Action of contract on a promissory note dated October 24th 1852, payable to the plaintiff. Answer "that said note was a payment and compensation for liquors sold in violation of law, delivered in the form and substance of a promissory note, and was received by the plaintiff without consideration and against law, equity and good conscience, and no action ought to be had or maintained thereon. And the defendant further says, that this note being given for intoxicating liquors sold in violation of all law, whether in this or any other state, an action on said note is an action for the recovery of the value of intoxicating liquors so sold as aforesaid, and cannot and ought not to be maintained in any court in this commonwealth, such note being not in accordance with the provisions of the act of our legislature, approved May 22d 1852, being chapter 322 of the acts of that year." Trial in this court before *Dewey*, J., who, after a verdict for the defendant, reported to the full court the following case:

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The defendant offered evidence that the consideration of the note, in whole or in part, was the sale by the plaintiff to the defendant of spirituous and intoxicating liquors, for the purpose of being resold by the defendant in violation of the laws of Massachusetts, the plaintiff knowing the object and aiding in the same. The plaintiff objected that this evidence was inadmissible under the answer. But the objection was overruled, and the evidence admitted.

The parties were introduced as witnesses, and there was evidence that in 1848 the plaintiff, who kept a grocery in Hudson, N. Y., came to the place of business of the defendant at Lenox, and solicited him to buy liquors of the plaintiff, and soon afterwards commenced trading with him.

As corroborative of the defendant's evidence of the course of dealing between these parties, and as showing that the plaintiff was in the habit of supplying the defendant with liquor to sell in Massachusetts, the defendant offered in evidence various bills of merchandise sold to him by the plaintiff from 1849 to 1852, and prior to the date of the note. These bills contained many charges for spirituous liquors, but did not of themselves show the consideration of the note in suit; and were forwarded from the plaintiff's shop in Hudson; some of them were in the plaintiff's handwriting, and all had been recognized by him as correct bills. The plaintiff objected to the competency of this evidence; but it was admitted as competent for some purposes, and in aid of the other evidence.

There was evidence on both sides of the knowledge of the plaintiff of the illegal purpose of the defendant in the use he was to make of the liquors bought of the plaintiff; and of the plaintiff's aiding and coöperating with the defendant, in carrying out the illegal purpose, with knowledge of said purpose.

The plaintiff contended that unless the defendant satisfied the jury that the consideration of this note was, wholly or in part, liquors sold by the plaintiff to be resold by the defendant in violation of law, the plaintiff was entitled to recover. The judge so ruled, adding "that if this note was given in renewal of a previous note given for said liquors, the consideration of

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the note would, like the previous one, be subject to this defence."

Upon the whole evidence the judge instructed the jury, "that if the plaintiff, previously to the sales commencing in 1849 and extending to 1852, came to the defendant's place of business at Lenox, and there requested the defendant to buy liquors of him to sell in Massachusetts; and if the defendant purchased such liquors of the plaintiff for the purpose of selling them in the State of Massachusetts, in violation of the statute laws of Massachusetts existing at the time, the defendant having no license or legal right to sell the same, but the same being forbidden by law; and if the plaintiff, knowing all this, and that the liquors were to be brought into the State of Massachusetts and sold in violation of the law of Massachusetts, did sell liquors to the defendant to be used for such illegal purpose, and did intentionally aid and assist the defendant, and coöperate with him in sending the same for the purposes aforesaid; then as to such liquors the plaintiff could not maintain an action to recover therefor; and if such liquors thus sold by the plaintiff constituted the consideration of the note, in whole or in part, it was an illegal consideration, and the plaintiff would not be entitled to maintain his action upon this note."

J. E. Field, for the plaintiff.

A. J. Waterman, for the defendant.

Hoar, J. 1. The defence to the note, upon the ground that the consideration for it was intoxicating liquors sold by the plaintiff to the defendant for the purpose of being resold in this commonwealth in violation of law, the plaintiff knowing this purpose and aiding in its execution, was undoubtedly a sufficient answer to the action, if properly pleaded.

Upon a careful examination of the answer, we think this defence is sufficiently stated. The answer, in one part of it, sets forth that the sale by the plaintiff was not in accordance with the provisions of the statute of 1852; but, in another part, it sets forth the broad ground that the sale was for the purpose of a resale in this commonwealth, with the knowledge and aid of the plaintiff, in violation of law.

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2. The bills for intoxicating liquors sold by the plaintiff to the defendant from 1848 to 1852, although the particular liquors charged in the bills were not shown to form any part of the consideration of the note in suit, were rightly admitted in evidence, to show the course of dealing between the parties, in connection with the proof of the plaintiff's knowledge of the defendant's business; as tending to show that the plaintiff knew that he was supplying a tradesman and dealer, and not a person purchasing the article for private use.

3. The instructions to the jury seem to us to have been full, explicit and correct. The cause has been argued by the plaintiff's counsel upon the ground that if the sale was legal in the place where it was made, the mere knowledge on the part of the seller of an illegal use to which the purchaser intended to apply the article sold, would not implicate the seller in the illegality, so as to vitiate the contract. But the instructions required the jury to find that the plaintiff not only knew the unlawful purpose, but that he "did intentionally aid, assist and coöperate with him in it," in order to find their verdict for the defendant. The defendant has therefore, certainly, no reason to complain of the instructions as not sufficiently favorable to him, and there must be *Judgment on the verdict for the defendant*

WILLIAM POULTNEY & another *vs.* JOHN MACKEY.

Upon the trial of an action to recover the price of intoxicating liquors, a plaintiff, who has testified that the liquors were sold and delivered in another state, may be asked on cross-examination if he knew or supposed they were to be resold in this commonwealth in violation of the laws thereof, although the only defence pleaded is that the liquors were sold in this commonwealth to be so resold. But he cannot be asked whether he had any right to sell liquors in the other state.

ACTION OF CONTRACT to recover the price of intoxicating liquors sold and delivered by the plaintiffs to the defendant.

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Answer, that "they were sold and delivered to him at West Stockbridge in this county, in violation of the laws of this commonwealth, and, as was well known to the plaintiffs, to be resold in this commonwealth in violation of the laws thereof." Trial in the court of common pleas before *Bishop*, J., who signed this bill of exceptions:

"The plaintiffs and a witness by them called swore that the intoxicating liquors were sold and delivered to the defendant at Hudson in the State of New York. On cross-examination, the plaintiffs were asked 'if they knew that the defendant intended to resell the liquors in this commonwealth in violation of the laws of this commonwealth;' and 'if they supposed that the defendant intended so to resell;' and also, 'if the plaintiffs had any right to sell liquors in the State of New York.' To these questions the counsel for the plaintiffs objected, and the court sustained the objections; the questions not being pertinent to the issue raised by the answer, and having no relation to matters inquired of in chief. The verdict was for the plaintiffs. To the above rulings the defendant excepted."

M. Wilcox, for the defendant.

I. Sumner, for the plaintiffs.

METCALF, J. It is true, as contended by the plaintiffs' counsel, that it was not open to the defendant at the trial to take the ground that the sale by the plaintiffs to the defendant, if made in the State of New York, was illegal; for the defendant, by his answer, had confined himself to proving a sale of liquors at West Stockbridge in this county, with knowledge that they were to be resold in violation of the laws of this commonwealth.

Still it is very clear that his right to cross-examine the plaintiffs or their witnesses, upon any part of the defence thus pleaded by him, could not be taken away or limited by the plaintiffs' evidence (which the defendant might at any subsequent stage of the trial contradict or control) that the sale was made in another state. The error in the ruling of the judge who presided at the trial seems to have consisted in treating the statement of a fact by the plaintiffs in their testimony as equivalent to the conclu-

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sive establishment of that fact against the defendant. We think the defendant might well show by the plaintiffs that the liquor was sold with knowledge that it was to be resold in violation of the laws of this commonwealth, and rely upon other testimony to prove that the sale was made at the place alleged in the answer.

The question whether the plaintiffs had any right to sell liquors in the State of New York was immaterial, and rightly ruled out. But for the refusal to permit the other questions to be put the *Exceptions must be sustained.*

LUKE B. MILLER *vs.* ASAHEL D. STEVENS.

In an action for an injury to the plaintiff's property by the defendant while in his service the plaintiff, if a witness in his own behalf, may be asked on cross-examination whether he did not settle with the defendant for his services during the period in question without making any claim for the alleged injury.

ACTION OF TORT. The declaration averred that the plaintiff employed the defendant to peddle goods for him, and in such employment furnished the defendant with a wagon and horses; and the defendant, while so employed, over drove and neglected to take care of the horses, by reason whereof they became sick and unfit for labor, and the plaintiff was put to great expense in curing them. The answer denied the immoderate driving, the neglect, the injury to the horses, and the expenses of the plaintiff.

At the trial in the court of common pleas, the plaintiff introduced his own and other testimony in support of the averments in the declaration. *Bishop*, J. allowed the defendant to show by cross-examination of the plaintiff, (although the plaintiff objected that "the evidence thus offered was incompetent, and in all respects improper, and inadmissible under the defendant's answer,") that soon after the alleged wrongful acts and negligence of the defendant, and soon after his period of service was ended, the plaintiff settled with the defendant for his wages, and

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gave him a note (which was also admitted in evidence, against the plaintiff's objection) for the amount due, and in making said settlement made no claim against the defendant for any of the matters alleged in this action; and that the defendant afterwards called on him repeatedly for payment of said note, and the plaintiff, without setting up any of those matters, promised to pay it. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

J Sumner & J. E. Field, for the plaintiff. If the matters admitted in evidence were substantial facts intended to be relied on in avoidance of the action, they should have been set forth in clear and precise terms in the answer. *St.* 1852, *c.* 312, § 18. *Mulry* v. *Mohawk Valley Ins. Co.* 5 Gray, 542–544. If they were not such facts, the evidence was immaterial, and, being calculated to prejudice the plaintiff's action, improperly admitted.

J. D. Colt, for the defendant.

Hoar, J. The question, to which the defendant objected, in effect sought to ascertain whether the plaintiff, by settling with the defendant for his services, and giving him a note, without suggesting the existence of any such claim as he asserts in this action, had not, by his conduct, shown that he did not then believe that such a claim was well founded. There can be no doubt that, on the cross-examination of a plaintiff who is testifying in his own case to the existence of certain facts, it is competent to inquire of him whether he has not acted as if no such state of facts existed. *Exceptions overruled.*

Asahel D. Stevens *vs.* Luke B. Miller.

Damages by the plaintiff to the defendant's property while in his employment cannot be set up in defence of an action on a promissory note given for such services, if a verdict for the plaintiff has been returned in an action brought against him by the defendant to recover such damages.

Action of contract on a promissory note. Answer, that the consideration of the note was services performed by the

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plaintiff for the defendant; that in the performance of such services the plaintiff was furnished by the defendant with a wagon and horses, and so over drove and neglected the horses that they became sick and of little value; and the defendant claimed to recover the damages so sustained. Replication, that since this action was brought, the defendant commenced an action against the plaintiff for substantially the same matters as those set forth in the answer in this case, and that a trial of said action upon all the issues raised by the pleadings resulted in a verdict for the plaintiff in this action; and therefore the plaintiff should not be held further to try the matters alleged in this answer. The defendant demurred to the replication. But the court of common pleas, *Bishop*, J. presiding, overruled the demurrer, a verdict was returned for the plaintiff, and the defendant alleged exceptions.

I. Sumner & J. E. Field, for the defendant.

J. D. Colt, for the plaintiff.

Hoar, J. The demurrer was rightly overruled. 1. The defendant having elected to avail himself of his claim against the plaintiff for damages by means of a separate action, and having brought his action, and prosecuted it till a verdict was rendered, could not also avail himself of the same claim in mitigation of damages in this suit.

2. The defendant's answer could not avail him. The note was given in settlement of the plaintiff's wages, after the facts on which the defendant relied had occurred, and were known to the parties. There can be no right in such a case to resist the payment of the note by setting up a tort committed by the plaintiff while in the defendant's service.

Exceptions overruled.

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Sheldon Norton *vs.* Albert Huxley.

Under the Rev. Sts. *c.* 74, § 8, as under the *St.* of 1834, *c.* 182, § 5, representations concerning the dealings or trade of a third person need not be in writing, unless made with the intent that such person may obtain credit, money or goods therefor.

A verdict and judgment for the defendant, in an action of contract upon a promise of the defendant to accept an order drawn upon the defendant in favor of the plaintiff, brought by one who had assigned to the plaintiff an unfinished contract of work for the defendant, are no bar to an action of tort by the plaintiff against the defendant, for inducing the plaintiff to take such assignment by false and fraudulent representations as to the amount remaining due from the defendant to the former contractor.

A declaration in tort alleged that the plaintiff assumed the prosecution of a contract of work, commenced for the defendant by another person, (who had become unable to carry it on,) being induced to do so by the false and fraudulent representations of the defendant that there would be no risk in the plaintiff's undertaking the work, and that the defendant had sufficient funds in his hands due to the former contractor. *Held*, that this declaration was supported by evidence that the defendant, upon being inquired of in behalf of the plaintiff, said that there would be funds enough to complete the undertaking if the former contractor went on and finished it, and that the plaintiff was thereby induced to go on with the work, though the plaintiff testified that he did not mean to assume the job, but only to assist the defendant.

Action of tort for false and fraudulent representations The declaration alleged "that in the year 1852 Henry Thompson was employed in the coaling of wood of the defendant in the town of New Marlborough upon the land of the defendant, and the defendant had agreed to make advances to the said Thompson as the work progressed, said advances not to exceed one half of the amount to which said Thompson would be entitled upon the completion of said contract, reserving in the defendant's hands the residue of the wages of said Thompson; and the said Thompson became unable to go on with the prosecution of said contract with the defendant; and this plaintiff made application to the defendant, asking information of him in relation to the said contract, and how far and to what extent the plaintiff could safely be interested in the prosecution of the same; and the said defendant, to induce the plaintiff to enter upon the further prosecution of said contract, falsely, fraudulently, knowingly and deceitfully represented to the plaintiff substantially that there would be no risk in going upon said job and prosecuting it; that he had in his hands reserved funds

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to pay for all assistance; that he did not care whom he paid, if the wood was burned into coal, and that he would retain in his own hands the funds which he had reserved; and the said plaintiff, confiding in these representations of the defendant, and believing the same to be true, took upon himself the further prosecution of the said contract, and made large outlay in labor, money, material and other supplies in and upon said contract, and caused to be delivered to the defendant large quantities of coal of great value; and in fact the said representations of the defendant were false, and the defendant had no reserved funds in his hands, and had greatly overpaid the said Thompson for the work which had been theretofore performed upon said contract; and by means of the premises the plaintiff has been greatly injured and defrauded." Trial in the court of common pleas in Berkshire at February term 1858, before *Mellen*, C. J., who signed this bill of exceptions:

"The plaintiff's counsel, in opening, made this statement: Thompson had a coal job with the defendant, on the defendant's land. Thompson became embarrassed, and applied to plaintiff to aid him. The plaintiff applied to the defendant to ascertain the situation of the contract. The defendant stated that some thirteen thousand to fifteen thousand bushels of coal had already been drawn in; that he had examined the coal book and found such to be the fact; that one half of the money on the contract had been retained by him; that if the contract was completed, there was an abundance to pay Thompson's hands, and a good deal more. Relying upon these statements, the plaintiff took an assignment of the contract from Thompson, and completed the job. These representations were not true. They were verbal.

"The defendant objected that these representations being verbal, no action could be maintained upon them. The court sustained the objection. A verdict was thereupon returned for the defendant. To which ruling the plaintiff excepts."

These exceptions were argued and decided at Lenox at September term 1858.

J. E. Field, for the plaintiff.

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I. Sumner, for the defendant, cited Rev. Sts. *c.* 74, § 3; *Lyde v. Barnard*, 1 M. & W. 107; 2 Steph. N. P. 1303; 1 Smith's Lead. Cas. 80, note to *Chandelor* v. *Lopus*.

DEWEY, J. As an original question, it might be plausibly urged that the Rev. Sts. *c.* 74, § 3, were intended to bar all actions for any verbal misrepresentations as to the character, credit, dealings or trade of a third person, under any and all circumstances in which they might be made; the words of limitation, found in the earlier statute of 1834, *c.* 182, § 5, to such representations as were made "to the intent or purpose that such person may obtain credit, money or goods thereupon," being omitted in the revised statutes.

But the court, in the case of *Medbury* v. *Watson*, 6 Met. 246, have held, that the Rev. Sts. *c.* 74, § 3, was to be construed as only a reënactment of the St. of 1834, *c.* 182, § 5. That decision substantially settles the present case. The representations required to have been made in writing are only those made with the intent that the person, concerning whom they are made, may obtain credit, money or goods thereupon.

The case shown by the plaintiff was not a case of any representations made by the defendant with intent that Henry Thompson "might obtain money, credit or goods thereupon" of the party to whom these representations were made. The plaintiff had under consideration the question of taking an assignment of an existing contract between Thompson and the defendant, for the burning of coal by Thompson, which had been executed in part, and of proceeding to perform the residue of the contract at his own cost and charges. With this purpose in view, the plaintiff applied to the defendant to ascertain how far the contract had been executed by Thompson, and what further remained to be done, and what amount of funds remained in the hands of the defendant to be accounted for with the party who should assume the contract, as succeeding Thompson therein.

The representations alleged to have been made by the defendant, it is true, in one sense, are representations as to the dealings of Thompson, but not to the intent that thereby money

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or goods should be paid or delivered to Thompson, or that the plaintiff should give him a credit for any goods or money lent or advanced, but in reference merely to the plaintiff's taking an assignment of the contract, and becoming interested as a party thereto in the place of Thompson.

It may be difficult to mark with precision the exact limits of the operation of the statute under consideration. It is sufficient, in the present case, to say that these representations were not of such a character as are required by the statute to be in writing, to be made the subject of an action. They were representations as to particular facts in the knowledge of the defendant, which, as they might exist or not, might influence the plaintiff in reference to his taking an assignment of Thompson's contract with the defendant; but not representations made with the intent stated in the statute. *Exceptions sustained.*

A new trial was had in the court of common pleas at October term 1858, before *Bishop*, J., at which the plaintiff introduced evidence tending to show that the defendant had made a contract with Thompson to make for the defendant twenty thousand bushels of charcoal from the defendant's wood, and deliver it at a certain furnace; that one Howe afterwards informed the defendant that Thompson could not go on without help, and that the plaintiff and Howe would help him if they could have their pay; that the defendant said, "He should not agree to pay any of Thompson's debts; there would be funds enough in his hands to carry out the undertaking, and a handsome sum over, if Thompson went on and finished it; he was not to pay but one half until the work was done, and had paid but little more than half, and, if Thompson left, there would be funds enough to carry out the contract; he had been on when the work was being done, and had seen the coal book, and from thirteen thousand to fifteen thousand bushels had been delivered; he did not care whom he paid after the wood was burnt, and after it was burnt he would accept an order from Thompson;" that Howe shortly afterwards informed the plaintiff what the defendant had said; and the plaintiff was thereby induced to take from

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Thompson an assignment in writing of the contract, and gave the defendant written notice thereof, and afterwards went on with the job, (the plaintiff testifying, however, "that he did not assume, on the part of Thompson, the contract with the defendant, but only meant to assist the defendant to burn the wood cut, and not to take on himself Thompson's obligations to the defendant,") and furnished labor, materials and money to a considerable amount, for which Thompson gave him an order upon the defendant, which the defendant refused to accept, or to pay to the plaintiff, alleging that he owed Thompson nothing, but that the latter was indebted to him; and that such was the fact; and that no payment had been made by the defendant to Thompson, after the assignment by Thompson to the plaintiff.

The defendant contended that this evidence did not support the declaration. But the court ruled that the evidence, if believed, would sustain the declaration.

The defendant then offered to show that the plaintiff had brought an action of contract against the defendant to recover for his services, materials and money furnished to Thompson, declaring upon a promise of the defendant to accept said order given by Thompson to the plaintiff, and upon the common counts; which action had terminated in a verdict and judgment for the defendant. The defendant offered the record of that case in evidence, and contended that that judgment was a bar to this action; and also offered to prove that the matters embraced in that action were the same as in this. But the court ruled that that judgment was not a bar to this action, and excluded the evidence.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

Sumner & J. D. Colt, for the defendant, cited, to the point of variance, 1 Chit. Pl. (6th Amer. ed.) 285; *Bristow* v. *Wright*, 2 Doug. 667; *Spurrier* v. *Elderton*, 5 Esp. R. 3; *Weall* v. *King*, 12 East, 452; *Jerome* v. *Whitney*, 7 Johns. 321; and to the point that the former judgment was a bar, *Embury* v. *Conner*, 3 Comst. 522; *Gardner* v. *Buckbee*, 3 Cow. 120; *Voorhees* v. *Bank of United States*, 10 Pet. 449; *Eastman* v. *Cooper*, 15 Pick. 276

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Norton v. *Doherty*, 3 Gray, 372; 2 Smith's Lead. Cas. 445, note to *Doe* v. *Oliver*.

Field & H. L. Dawes, for the plaintiff.

MERRICK, J. Two exceptions were taken by the defendant upon the trial; one in relation to the effect of a judgment rendered in a former suit between these parties, and the other as to the sufficiency of the evidence produced to support the plaintiff's declaration. The presiding judge ruled that the evidence, if believed by the jury, would sustain the declaration, and that the judgment relied upon did not constitute a bar to the maintenance of this action. The questions now to be determined are whether these rulings were respectively correct.

The principle is well settled, that a judgment in a former suit between the same parties is a bar to a subsequent action only when the point or question in issue is the same in both. The judgment is conclusive in relation to all matters in the suit which were put in issue; but has no effect upon questions not involved in it, and which were not then open to inquiry, or the subjects of litigation. *Sage* v. *McAlpin*, 11 Cush. 165. *Eastman* v. *Cooper*, 15 Pick. 276. *Bigelow* v. *Winsor*, 1 Gray, 299. *Foote* v. *Gibbs*, 1 Gray, 412. Governed by this principle, it is very plain, upon a comparison of the allegations and cause of action set forth in the former suit, the record of which the defendant produced and offered to give in evidence, with the allegations and cause of action set forth in this, that the points or questions in issue are not the same in the two suits, and consequently that the judgment in the former constitutes no bar to the maintenance of the present action. It is true that both originated in the same series of transactions, and in the conversations and communications which took place between the parties concerning them. But the result of the former suit shows that the plaintiff there wholly mistook the effect of what was said by the defendant, and so failed to establish the claim which he then attempted to enforce. That was an action of contract, in which a promise and a breach of the promise were averred. This is an action of tort, in which the plaintiff alleges that he sustained damage by the wilfully fraudulent representations of

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the defendant. Proof which would fully support the one would have no tendency to maintain the other; for the reason, that the questions involved in the respective issues were essentially unlike. It follows, as a necessary consequence, that the judgment in one of them is not competent evidence upon the trial of the other, and cannot have the effect of precluding the plaintiff from maintaining it. The ruling of the court was to this precise effect, and the record of the former suit was therefore properly excluded from being given in evidence upon the trial of this.

As to the sufficiency of the evidence, if believed by the jury, to support the declaration, we think the ruling of the court was correct. It amounted to no more than this; that, giving proper effect to the testimony, the conclusion might fairly be deduced from it, that the defendant did make the representations which are set forth in the declaration. The witnesses did not testify that he made use of the precise phrases and expressions which constitute the averments in the declaration; but the statements and representations, which they say that he did make, appear to be, in meaning and effect, substantially the same as those of which the plaintiff complains, and which he sets forth as the ground and basis of his action. This seems to us to be the fair, and perhaps it might also be said the necessary result, of an examination and comparison of the allegations in the declaration and the statements and testimony of the witnesses; and the court could not therefore sustain the objection taken by the defendant, that, upon the evidence produced, the action could not be maintained. As this is chiefly a question of fact, we do not deem it important or useful here to pursue the argument in relation to it in detail; but it is enough to state in general terms the conclusion to which, upon the examination of the evidence and the ruling upon it, we have arrived. *Exceptions overruled.*

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Edwin Shears *vs.* Seth Dusenbury.

This clause, immediately following the description of land conveyed by deed, "A portion of the above described premises was set off on execution by A against B" on a certain day for a certain sum, "and this conveyance is made subject to the incumbrance of said execution," is an exception of the incumbrance of the execution, and not of the piece of land set off.

A judgment for the plaintiff in a writ of entry to foreclose a mortgage is conclusive in his favor against any title acquired by a defendant in that suit before it was commenced.

Hoar, J. In an action of tort for breaking and entering the plaintiff's close, brought in the court of common pleas, a referee agreed on by the parties under a rule of court made an award in favor of the plaintiff, unless in the opinion of the court the title of the plaintiff, which he sets forth specifically in the award, was not sufficient to maintain the action. The court of common pleas ordered judgment upon the award for the plaintiff, and the case comes before us upon an appeal.

Both parties claim under Samuel Shears. The plaintiff's title was a deed, including the close in controversy, from Samuel Shears to him, dated and recorded March 17th 1852; a deed dated January 22d 1853, from the plaintiff to S. F. Dusenbury of the same premises; which contained, immediately after the description of the premises, this clause: "A portion of the above described premises was set off on execution of Austin L. Scott against Samuel Shears on the 2d of October 1852, for the sum of $163.49, and this conveyance is made subject to the incumbrance of said execution, reference being had to the record thereof in the registry of deeds" &c.; a mortgage of the same from S. F. Dusenbury to the plaintiff of the same date, referring to the preceding deed for a description of the granted premises; and a judgment recovered by the plaintiff against the defendant and S. F. Dusenbury, upon a writ of entry to foreclose the mortgage, upon which a writ of possession issued on the 16th of March 1856, and the officer returned the delivery of seisin and possession to the plaintiff on the 26th of March 1856. The suit in which the judgment was rendered was commenced on the 11th of June 1855.

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The defendant relied on an execution in favor of one Scott against Samuel Shears, dated October 6th 1852; a levy upon the premises in dispute, under said execution, on the 13th of October 1852; the attachment of the premises upon the original writ in the same suit in which the execution issued, dated October 8th 1849; and a deed from Scott to Dusenbury of the same, dated December 12th 1853, with parol evidence that the grantee in said deed was the defendant.

On examination of the deeds introduced by the plaintiff, it is evident that the exception of the execution was only of the incumbrance which it might create by reason of the attachment or levy, and not an exception, from the grant, of the piece of land which was set off on the execution to Scott. The plaintiff conveyed to S. F. Dusenbury the whole land, by a sufficient description, and took back a mortgage of the same, leaving the grantee in the deed and the mortgage respectively, to get rid of the title under the execution if he could, or to submit to it, but without any right to resort to his grantor upon his covenants.

The case then stands thus: Whatever title the defendant has, he had before the judgment which the plaintiff recovered upon his mortgage in 1856. If that judgment was conclusive against the defendant in favor of the title of the plaintiff to the close at that time, the defendant has acquired no new title since. We are of opinion that it was thus conclusive. It was recovered in a real action, in which the defendant was a party. He then had his day in court. If his title under the levy of the execution was a valid one, he had an opportunity to show it in bar of the action. The plaintiff declared against him as a disseisor, and the judgment settled the fact that he was seised wrongfully. The service of the writ of possession gave a seisin to the plaintiff against him; and he can set up no previous title in himself, inconsistent with the plaintiff's seisin so acquired. How the plaintiff came to join him as a defendant, or what title the plaintiff supposed or expected to prove that he had under S. F. Dusenbury, or what objections the plaintiff had to the validity of the execution, it is now too late, and the judgment makes it unnecessary to inquire.

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The cases* cited by the defendant's counsel are only to the point that the delivery of seisin by an officer upon a writ of possession gives no seisin against a person not a party to the judgment, without actual entry and ouster. But the defendant was a party to the judgment.

Judgment for the plaintiff upon the award.

J. E. Field, for the defendant.

M. Wilcox, for the plaintiff.

Daniel Brolley *vs.* Patience Lapham.

Proof that an instrument purporting to be under seal was signed by the person named therein is sufficient evidence of its execution to be submitted to the jury, although that person, having been called as a witness by the party seeking to prove the instrument, has testified that no seal was on the instrument when he signed it.

An agreement by the purchaser of an equity of redemption, that his grantor may use his name in resisting the foreclosure of the mortgage, is no bar to an action by such purchaser against such grantor to foreclose the mortgage.

Writ of entry to foreclose a mortgage of land in Adams. Plea, nul disseisin. Trial in the court of common pleas, before *Briggs*, J., who signed this bill of exceptions:

"The defendant relied upon two grounds of defence: 1st. That she never executed the mortgage — but upon this ground of defence no question now arises. 2d. That the plaintiff made a writing under seal, covenanting with the defendant that he would aid her in defending against the said mortgage, which the defendant claimed was invalid, and of which the plaintiff was informed, and that the plaintiff's name might be used by the defendant in any suit or legal proceeding concerning said mortgage.

"In support of this second ground of defence, the defendant offered in evidence the following paper: 'Whereas a portion of a lot belonging to Patience Lapham, [described,] on which there

* *Rott* v. *Burnell*, 9 Mass. 99, and 11 Mass. 163. *Blood* v. *Wood*, 1 Met. 528

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is what purports to be a mortgage for eight hundred dollars, given on the 19th day of July 1855 by said Patience Lapham and one Lydia L. Cumming to and in favor of Joshua Reed, has been conveyed by the said Patience Lapham to Daniel Brolley, one of the subscribers; the validity and amount of which mortgage the said Patience is desirous should be contested for her own benefit, or the benefit of any other person or persons who may through her become interested therein. Now therefore, in consideration of the premises, and of one dollar to us in hand paid, the receipt whereof is hereby acknowledged, we the undersigned, agree that our name or names, or the name of the said Daniel Brolley, the aforesaid grantee of said premises, and of our and his assigns, may be used as a party or parties in either the defence or prosecution of any suit or suits for either the cancelling of said mortgage or any part thereof, or in resistance of the foreclosure thereof, or in any other manner by way of resistance to said mortgage, at the risk and expense of those by whom said name or names may be used, as aforesaid. And we further agree that there shall be no interference with the legitimate use of said names for the purpose aforesaid. In witness whereof we have hereunto set our hands and seals this 19th day of December 1856. Daniel Brolley [Seal.]

'Sealed and delivered in presence of T. Robinson.' James Brolley [Seal.]'

"The plaintiff denied its execution; and the defendant then called the plaintiff as a witness to prove its execution, who testified that he put his name to the paper, but that it had no seal upon it at the time, and none was ever put on by his consent.

"The defendant then called John Cumming, who testified that he saw the plaintiff put his name upon the paper, but had no recollection about the seals one way or the other; that he took the paper soon after the names were put to it, how soon he could not tell, but he thought very soon, and it had been in his possession all the time till he had sent it to Mr. T. Robinson, to be used in this suit, and no alteration had been made of it while so in his possession, to his knowledge.

"The defendant then called Mr. T. Robinson, who testified

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that his name as subscribing witness to the paper was in his handwriting, but that he had no recollection of the execution of the paper or of the seals one way or the other; but that, from the time the paper came into his hands from Mr. Cummings, it had not been altered, to his knowledge.

"Upon this evidence the court declined to permit the paper to be read to the jury, deciding that its execution had not been proved. A verdict was rendered for the plaintiff, and the defendant excepts."

J. T. Robinson, (*T. Robinson* with him,) for the defendant. 1. The exclusion of the paper offered in evidence was erroneous. The plaintiff was estopped to deny his seal. *Adams* v. *Bean*, 12 Mass. 139. The question of the execution of the instrument should have been submitted to the jury. *Russell* v. *Coffin*, 8 Pick. 143. *Commonwealth* v. *Porter*, 10 Met. 263. *Davis* v. *Maxwell*, 12 Met. 289. *Farnum* v. *Davidson*, 3 Cush. 232. *Chase* v. *Breed*, 5 Gray, 440. 1 Greenl. Ev. § 49.

2. The paper offered was a bar to the action. *Shed* v. *Pierce*, 17 Mass. 628. *Dow* v. *Tuttle*, 4 Mass. 414. *Sewall* v. *Sparrow*, 16 Mass. 26. *Foster* v. *Purdy*, 5 Met. 442. *Harris* v. *Brooks*, 21 Pick. 195. *Dean* v. *Newhall*, 8 T. R. 168. *Harrison* v. *Close*, 2 Johns. 448.

H. L. Dawes, for the plaintiff. 1. It was the province of the court to decide whether the execution of the instrument had been sufficiently proved, to allow it to be read to the jury; and the decision upon that question of fact is not open to exception. Rev. Sts. *c.* 82, § 12. *Commonwealth* v. *Porter*, 10 Met. 286, 287. *Clayton* v. *Anthony*, 6 Rand. 285. *State* v. *Ladford*, 6 Ired. 5.

And the fact was rightly decided; for the evidence proved that the instrument was not executed.

2. The paper, if admitted in evidence, would be no defence to this action. *Perkins* v. *Gilman*, 8 Pick. 231. *Foster* v. *Purdy*, 5 Met. 444, 445. *Ford* v. *Beech*, 11 Ad. & El. N. R. 869. *Smith* v. *Mapleback*, 1 T. R. 446. Chit. Con. (8th Amer. ed.) 777.

Bigelow, J. The court erred in ruling that there was no proof of the due execution of the paper offered by the defendant to be submitted to the jury. Although the plaintiff denied that

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there was a seal upon it when he affixed his signature to it and the subscribing witness was unable to testify to the fact, yet the instrument itself, when it was signed by the plaintiff, purported to be under seal. It was therefore on its face a direct and solemn admission in writing by the plaintiff that the instrument was then under seal, and well authorized the defendant to contend before the jury that the plaintiff, in denying that the instrument was under seal when executed by him, was either mistaken or testified falsely. A party is not estopped to affirm a fact material to the issue, because it has been denied by a witness called by himself. If it were so, he might be compelled to sacrifice his case by putting on the stand an adverse and corrupt witness whom he was obliged to call. A party may contradict, but cannot impeach his own witness. *Brown* v. *Bellows*, 4 Pick. 194.

But the ruling of the court on this point, although erroneous, was immaterial to the issue on trial, and does not entitle the defendant to a new trial. The instrument offered in evidence constituted no bar to an action on the mortgage. It was neither a release, nor a covenant not to sue the mortgage. It did not even amount to an agreement by the plaintiff that the mortgage was invalid. He did not agree that he would not foreclose it or enforce it by suit. It was only an agreement that the defendant might use the name of the plaintiff, in case she should find it necessary to do so in order to contest the validity of the mortgage. If the plaintiff has committed a breach of this agreement, the damages thereby sustained would not necessarily be equivalent to the value of the mortgaged estate. Such breach therefore could not be set up and supported as a bar to this suit in order to avoid circuity of action.

Besides, it does not appear that the use of the plaintiff's name could in any way have availed the defendant in contesting the validity of the mortgage. Every ground of defence was open to her in this action, and the jury have found that the mortgage was valid. It does not appear that the verdict would have been different, if the action had not been in the name of the plaintiff, but had been brought by the original mortgagee or any other person. *Exceptions overruled.*

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Washington L. Hubbell *vs.* Washington Bissell.

The question how much a lessor shall pay a lessee for the surrender of his lease at a future day cannot be referred to arbitration by submission under the Rev. Sts. *c.* 114.

On a submission under the Rev. Sts. *c.* 114, of the question how much a lessor should pay his lessee for the surrender of his lease at a future day, and of all other claims between the parties which could be the foundation of an action at law or a suit in equity, the referees awarded that the lessor should recover of the lessee a certain sum, and added that they had considered that the lease was to be surrendered at the day agreed upon. *Held*, that the award was void.

Acceptance by the parties gives no validity to an award on a submission under the Rev. Sts. *c.* 114, of matters which are not the subject of such a submission.

Motion for the acceptance of an award rendered upon a submission under the Rev. Sts. *c.* 114.

By the terms of the submission, Hubbell agreed to surrender a certain lease of real estate which he held from Bissell on the 1st day of April then next, provided Bissell should pay him such a sum, if any, as the referees should award to be paid for such surrender; and the parties further submitted to the determination of the referees all claims and demands between them, of every name and kind, which could be the foundation of a suit at law or a bill in equity.

The referees awarded that Hubbell recover of Bissell the sum of $294.83, and costs of reference and of court; and added: "In the above award we have considered and passed upon the claims of the respective parties concerning the surrender of said lease, which lease and all property and claims thereunder held are to be surrendered by said Hubbell to said Bissell on the first day of April next; it being considered and found by us that all the real estate and all the property now upon the said premises," (with certain exceptions,) "is to be surrendered as aforesaid. And we append the foregoing to our award above written at the request of the parties."

The defendant objected to the acceptance of the award, on the ground that it included matters not within the jurisdiction of referees appointed under the Rev. Sts. *c.* 114.

At the hearing in the court of common pleas, the plaintiff

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offered to prove that the award, on the day in which it was made, and before it was sealed up and addressed to the court, was published to the parties, and Bissell then expressed himself satisfied with it, and took (saying that they belonged to him) and had since retained two promissory notes, amounting to $300, made by him, which had been laid before the referees by Hubbell as a part of his claim, and had been passed upon by them; that the plaintiff, in obedience to the award, on the first day of April then next surrendered the lease to Bissell, and delivered to him possession of the real estate and of all the personal property mentioned in the statement of the referees; and Bissel entered into the possession thereof, and had used and occupied the same since, without interference by Hubbell. *Bishop*, J., rejected the evidence, and set aside the award. The plaintiff alleged exceptions.

B. Palmer, for the plaintiff. The submission includes nothing which cannot be submitted under the Rev. Sts. *c.* 114. But if it does, the parties, by presenting the same to the referees without objection, have waived all right to object on that ground. *Brown* v. *Bellows*, 4 Pick. 179.

The award is for the payment of money, and nothing else. The statement annexed to it by the referees at the request of the parties is no part of the award, and cannot affect it. *Lyman* v. *Arms*, 5 Pick. 213.

The evidence offered should have been admitted to show that Bissell had accepted the award, and taken and retained the notes, and availed himself of all the benefits arising to him from the award, and had thereby ratified it, and was bound to perform it. *Culver* v. *Ashley*, 19 Pick. 300.

I. Sumner, for the defendant. The submission includes matters not within the jurisdiction of arbitrators appointed pursuant to the Rev. Sts. *c.* 114; and the award, being for one gross sum, is therefore wholly void. *Henderson* v. *Adams*, 5 Cush. 610. *Abbott* v. *Dexter*, 6 Cush. 108. *Carpenter* v. *Spencer*, 2 Gray, 407. *Thrasher* v. *Haynes*, 2 N. H. 429.

Where referees act without jurisdiction, their award is void, even if submitted to by the party objecting. *Capron* v. *Van Noorden*, 2 Cranch, 126.

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METCALF, J. The question, how much the defendant should pay to the plaintiff for the plaintiff's surrender of a lease to him at a future day, was not "the subject of a personal action at law or of a suit in equity," within the Rev. Sts. *c.* 114, § 1. It was therefore not a subject of submission to arbitrators, under that chapter, and their award concerning it is of no legal validity.

Other matters were rightly submitted to the arbitrators, but they have awarded a gross sum to be paid by the defendant to the plaintiff, so that the court cannot sever the part that is invalid from that which, if passed upon separately, might have been valid. The whole award is therefore void.

The acceptance of the award by the defendant did not give jurisdiction to the arbitrators. *Exceptions overruled*

HERMAN D. BURGHARDT *vs.* CHARLES M. OWEN & another.

An award under the Rev. Sts. *c.* 114 must be returned within the time specified in the submission to a term or session of the court of common pleas, and not merely filed in the clerk's office; and an omission so to return it cannot be waived orally.

MOTION for the acceptance of an award of referees upon an agreement of submission entered into before a justice of the peace on the 17th of June 1857, pursuant to the Rev. Sts. *c.* 114, and providing that the award should be "made and reported within one year from this day to the court of common pleas." The award was made by the arbitrators on the 14th of June 1858, was filed in the clerk's office on the 15th of June 1858, when no court was in session, and addressed by the referees "to the court of common pleas next to be holden at Lenox on the fourth Monday of June 1858," on which day a court was in fact holden.

The defendants objected to the acceptance of the award, on the ground that it was not returned within the time required by law.

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The parties agreed that in May or the early part of June 1858, the plaintiff's attorney wrote to the defendant's attorney, who had had the submission ever since it was entered into, requesting him to have a day named for the hearing; that the defendant's attorney thereupon sent the submission to the chairman of the arbitrators, who appointed the 14th of June 1858 for the hearing; that the defendant's attorney, after the day was so named, requested the plaintiff's attorney to have another day named, and proposed a new rule; and that "no objection was made at the hearing, or at any time before the award was opened, nor was anything said, by way of assent or dissent, to the making of the award, on the ground that the award could not be made and returned to court in the time limited by law."

The court of common pleas accepted the award, and the defendant appealed.

J. E. Field, for the defendant.

J. D. Colt, for the plaintiff. 1. The award, having been filed in the clerk's office within a year, was filed in time. Rev. Sts. *c.* 114, §§ 1, 5, 7, 9. *Mott* v. *Anthony*, 5 Mass. 489. *Southwoth* v. *Bradford*, 5 Mass. 524. *Walker* v. *Melcher*, 14 Mass. 148. *Skeels* v. *Chickering*, 7 Met. 316.

2. The defendants, having called out the referees, making no objection, cannot now avail themselves of the fact that the award was not seasonably returned. *Fox* v. *Hazelton*, 10 Pick. 275. *Abbott* v. *Dexter*, 6 Cush. 109. *Heath* v. *Tenney*, 3 Gray, 381. *Smith* v. *Robinson*, 13 Met. 165. *Maynard* v. *Frederick*, 7 Cush. 250.

Bigelow, J. The court of common pleas had no jurisdiction of the award in this case. It was not returned within the time limited by the submission, and the court had no authority to receive it afterwards. The filing of this award in the clerk's office within the year gives it no validity. By the express terms of a submission under the Rev. Sts. *c.* 114, § 2, it must be returned to the court. This can be done only at a term or session. *Eaton* v. *Framingham*, 6 Cush. 245. The clerk has no authority to receive it, nor are the parties required to take notice of the award, or any proceedings under it, except in court. This is

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manifest from § 10 of the statute, which provides that it may be returned at any term or session within the time limited by the submission, during which parties are required to attend without notice. But after that time parties cannot be called on to answer to an award, nor can the court take cognizance of it.

This is not a case where any act of the parties can operate as a waiver, so as to give validity to the award. *Heath* v. *Tenney*, 3 Gray, 380. *Eddy's case*, 6 Cush. 28. The jurisdiction of the court depends on a strict compliance with the requisites of the statute. It is true that by § 6 it is provided that the time within which an award may be made and reported may be varied by the agreement of the parties. But a mere waiver of a right is not equivalent to an express agreement. Besides, this provision is intended only to enable parties to fix a longer or shorter time for the making and return of an award, than the term of one year prescribed in the form of submission in § 2. But it is clear that such variation cannot be made by parol. It would be contrary to the whole tenor of the statute to hold that so essential an element in the submission, as the time within which the arbitrators had authority to hear the parties, might be left to the vagueness and uncertainty of parol proof. We doubt very much whether any change in the time limited originally in a submission can be subsequently varied without an agreement in writing, and the formality of an acknowledgment before a justice of the peace. However this may be, it is clear that acts, which in ordinary cases might amount to a waiver of a right, cannot enable the court to take jurisdiction of an award, which, on its face, was not returned within the time required by law.

Judgment for the defendants.

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PETER DOOLEY *vs.* GRAHAM A. ROOT.

A sheriff is not liable for the services of a person employed by his deputy to keep property attached by the latter.

ACTION OF CONTRACT, brought to this court by appeal from a decision of the court of common pleas upon a demurrer to the declaration. The case is stated in the opinion.

J. N. Dunham, for the plaintiff.

J. C. Wolcott, for the defendant.

HOAR, J. The plaintiff seeks to charge the defendant, the sheriff of the county of Berkshire, with an amount due to the plaintiff for services rendered to a deputy of the sheriff, in keeping property attached by the deputy. The attachment of the property by the deputy was an official act, and he contracted with the plaintiff to serve as keeper. But there is nothing in the relation of a sheriff to his deputy, which can make the sheriff answerable upon the contracts of his subordinate officer. It is no part of the official duty of a deputy sheriff to make contracts with other persons to assist him in the discharge of his official duties. If he makes such contracts, he makes them for his own convenience, and on his own responsibility. The sheriff might as well be charged for the cost of a horse or carriage hired by his deputy for the purpose of serving a writ. No authority has been cited in favor of such an action as the present, and we are not aware that any can be found.

The case of *Baker* v. *Fuller*, 21 Pick. 318, cited at the argument, in which it was held, that the sheriff might have an action against the keeper for property in his possession, does not support it. The sheriff is responsible to the attaching creditor, and to the debtor, for property attached by his deputy, and thus has an interest in the property, which he may assert by a proper action. But it does not follow that he is responsible for his deputy's contracts for the services of the person in whose hands the property is placed.

Demurrer sustained, and judgment for the defendant

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At the hearing before *Dewey*, J., the defendant objected to the maintenance of the bill "that one of the joint debtors has at all times resided in this state; that, at the time when the attached notes were given, Couch promised and agreed with Werden to pay all the outstanding claims against Couch & Werden, including the plaintiff's debt, but of which agreement the plaintiff had no knowledge; that Werden had executed a transfer of the attached notes after they were due, and after the plaintiff's attachment, to some person in Illinois; and that the notes were in the hands of Royce, at the time of the service of this bill upon him, for the purpose of receiving payment on the same, and for no other purpose." The judge overruled the objection, and entered a decree for the plaintiff, subject to the opinion of the full court.

M. Wilcox, for the defendant. In order to entitle a creditor to compel the application in equity, "in payment of a debt due from any debtor not residing in this commonwealth," of any property "of such debtor, within this commonwealth," which cannot be reached at law, all the debtors must reside out of the Commonwealth. *St.* 1851, *c.* 206. *Silloway* v. *Columbian Ins. Co.* 8 Gray, 199. *Brown* v. *Delafield*, 1 Denio, 445.

J. E. Field, for the plaintiff.

Bigelow, J. The bill in this case states a case which enti tles the plaintiff to the remedy provided by the *St.* of 1851, *c.* 206. The purpose of that statute was to enable a creditor to reach, and apply in payment of his debt, every kind of valuable right or interest, either legal or equitable, in this commonwealth, belonging to a non-resident debtor, which could not be come at to be attached or taken on execution in a suit at law against such debtor. The effect of the statute was to place non-resident debtors more nearly on the same footing with those residing here. Creditors always had the power to enforce their claims against the latter, and compel the surrender of property belonging to them, which was beyond the reach of attachment or seizure, by committing them on execution. But as against non-resident debtors, there was no such remedy before the enactment of this statute.

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In the present case, the plaintiff has a claim against one of the defendants, who resides out of the Commonwealth, and who is the owner of choses in action which are in the hands of an agent residing here. This is the exact case provided for in the statute. It is no objection that the debt due the plaintiff is a claim against a partnership of which the non-resident debtor was a member. Each partner is liable *in solido* for the debts of the firm, and his private property is liable to be taken in satisfaction of a partnership debt. The plaintiff has therefore a right to reach by this process the separate property of one of the firm, who resides out of the State. The right of a creditor of the firm to take the property of one of the copartners, by attachment or on execution, cannot be affected by any agreement of the copartners *inter sese* on dissolution, that the other copartner shall pay all the debts of the firm. *Decree for the plaintiff.*

HENRY V. BUCK & others *vs.* SALMON BURLINGAME.

Where an attachment of the property of one partner by a creditor of the partnership is dissolved by the assignment of the estate of that partner under the insolvent laws, the creditor, upon proving his debt and the costs of his suit against his estate, is entitled to be paid such costs, before the payment of the partner's individual debts.

PETITION IN EQUITY, under St. 1838, *c.* 163, § 18, to revise a decree of the court of insolvency. The petitioners alleged that they were creditors of the estate of George W. Bradford, who on his own application had been declared an insolvent debtor, and his estate duly assigned to the respondent; that Bradford had previously been in partnership with Joseph H. Crosby, but had dissolved such partnership before his application to the court of insolvency; that the petitioners' debt was contracted by said firm before its dissolution; that the petitioners, before the commencement of the proceedings in insolvency, had commenced a suit on said debt, and attached the private property of Bradford; that their attachment was dissolved by the assignment;

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that the petitioners proved their debt, and the costs of their suit, against Bradford's estate before the court of insolvency, and prayed that court to order said costs to be paid in full after the payment of preferred debts; but that court ordered such costs to be postponed to the private debts of Bradford. The respondent demurred to the petition.

H. L. Dawes, for the petitioners. By the *St.* of 1841, *c.* 124, § 6, whenever an attachment is dissolved by virtue of proceedings in insolvency, if the claim in suit is proved against the estate of the insolvent, the costs of the suit may also be proved, and "shall be considered a privileged debt, and have a priority or preference, and be paid in full, after the payment of those debts which now have a priority or preference by virtue of the provisions of the act to which this is in addition," to wit, debts due to the United States, or to any person who, by the laws of the United States or of the Commonwealth, are entitled to such priority or preference. *St.* 1838, *c.* 163, § 12. The petitioners' claim against the partnership was properly proved against the estate of one partner. *Barclay* v. *Phelps*, 4 Met. 397. The costs of keeping property attached are in the nature of a lien, and to be paid, like other liens, before distributing the property. And the petitioners have pursued the proper course to obtain the allowance of this claim. *Thayer* v. *Mann*, 2 Cush. 374.

L. H. Gamwell, for the respondent. By the insolvent laws of this commonwealth, the assets of insolvent debtors are marshalled; the individual assets to pay, in the first place, individual debts; and the copartnership assets to pay copartnership debts. *St.* 1838, *c.* 163, § 21. *Howe* v. *Lawrence*, 9 Cush. 553. *Fall River Whaling Co.* v. *Borden*, 10 Cush. 458. *Somerset Potters Works* v. *Minot*, 10 Cush. 592. *Purple* v. *Cooke*, 4 Gray, 120. The costs which are allowed as a privileged debt by the *St.* 1841, *c.* 124, § 6, are so allowed as incident to the debt itself, to be allowed only when the principal debt is allowed, and to be paid, if at all, out of the same fund which may lawfully be applied to the payment of the debts to which they are the incident. *Sampson* v. *Clark*, 2 Cush. 173. *Morris* v. *Briggs* 3 Cush. 342.

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By the Court. The court are of opinion that the costs of a suit where an attachment is dissolved are in the nature of a lien upon the property, and are to be regarded as expenses in receiving it for the estate, to be paid from the estate before any marshalling of assets, and before any dividend is made to any class of creditors, except those whom the statute expressly directs to be preferred. This is the equity of the statute; and there is nothing in the letter of the law to the contrary.

Order reversed.

Artemas Bigelow *vs.* Aaron Colton.

One who puts his name, before delivery, on the back of a promissory note payable to the maker or order, and indorsed by the maker, is an indorser, and not a joint maker; and his liability cannot be varied by parol evidence.

Action of contract against Aaron Colton as a joint and several maker of this promissory note:

"Great Barrington, July 18th 1857. Two months after date I promise to pay to the order of myself two hundred and fifty dollars at the Mahaiwe Bank, for value received.

"Edwin Hurlbut."

Upon the back of the note was the signature of Hurlbut, and under it that of Colton; and at the trial in the court of common pleas it appeared that both names were signed before the delivery of the note to the plaintiff; the signature of Hurlbut being made first. *Bishop*, J. ruled that the defendant could not be held as a maker, and directed a verdict for the defendant, which was returned, and the plaintiff alleged exceptions.

B. Palmer, for the plaintiff. A person, not a party to a note, putting his name upon the back of it, before it is delivered, thereby becomes liable as a maker of the note. *Josselyn* v. *Ames*, 3 Mass. 274. *White* v. *Howland*, 9 Mass. 314. *Baker* v. *Briggs*, 8 Pick. 130. *Austin* v. *Boyd*, 24 Pick. 64. *Richardson* v. *Lincoln*, 5 Met. 203. *Union Bank* v. *Willis*, 8 Met. 504. *Benthall* v. *Judkins*, 13 Met. 265.

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S. B. Sumner, (*I. Sumner* with him,) for the defendant.

BIGELOW, J. A promissory note payable to the order of the maker, and by him indorsed, is in legal effect a note payable to bearer. By placing his name on the back of the note, the maker agrees to pay it to whomsoever may be the holder thereof. Story on Notes, §§ 16, 36 *a*. Although a note payable to bearer is transferable by delivery, it may also be transferred by the indorsement of any holder. In such case, the indorser incurs the same obligations and liabilities as an indorser of a note payable to order, and is entitled to demand and notice. Story on Notes, § 132.

This case does not fall within that anomalous class of cases where a third person, neither maker nor payee, puts his name on the back of a note before its indorsement by the payee; but is the ordinary case of an indorsement of a note payable to bearer, the effect of which cannot be varied or controlled by parol proof. *Pierce* v. *Mann*, 17 Pick. 244. *Howe* v. *Merrill*, 5 Cush. 80. *Prescott Bank* v. *Caverly*, 7 Gray, 220.

Exceptions overruled.[*]

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[*] A similar decision was made at Boston at January term 1860.

JARVIS M. LAKE *vs.* LEBBEUS STETSON & another.

ACTION OF CONTRACT against Stetson and Bates as joint makers of a promissory note, signed by Stetson, payable to his own order, and indorsed first by Stetson and then by Bates. Stetson was defaulted. At the trial in the superior court of Suffolk at November term 1858, *Allen*, C. J. rejected evidence, offered by the plaintiff, that the note was given by the defendants as part of the consideration of a joint purchase by them, and that the note and all the signatures thereon were made at one interview and before the delivery of the note; both defendants declaring at the time that it was a joint note, and the plaintiff receiving it as such. A verdict was taken for the defendant Bates, and the plaintiff's exceptions were

Overruled by this court.

J. A. Andrew & J. W. Browne, for the plaintiff, cited *Chaffee* v. *Jones*, 19 Pick. 260; *Union Bank* v. *Willis*, 8 Met. 504; *Hawkes* v. *Phillips*, 7 Gray, 284; *Riley* v. *Gerrish*, 9 Cush. 104; *Austin* v. *Boyd*, 24 Pick. 64; *Richardson* v. *Lincoln*, 5 Met. 201; *Newell* v. *Holton*, 10 Gray.

J. W. May, for the defendant Bates.

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PEARLY TRUESDELL & another *vs.* STEPHEN R. GAY & others.

A wall, built around three sides of the stack of an iron furnace, at the distance of a few feet from it, in order to protect it from the possible sliding down of earth from a hill at the foot of which it stands, is not a building, within the meaning of the *St.* of 1851, *c.* 343, and including labor performed upon the wall, in a statement filed in the town clerk's office under that statute, will defeat any lien for work done upon the furnace.

PETITION, under *St.* 1851, *c.* 343, to enforce a lien upon real estate for labor upon the stack of an iron furnace, and upon the walls built around three sides of it, and at the distance of a few feet from it, to protect it from the earth which might otherwise slide down upon it from a hill at the foot of which it stood.

The certificate filed by the petitioners in the registry of deeds, under *St.* 1851, *c.* 343, § 2, stated the account as in the margin.*

At the trial in the court of common pleas, it appeared that all the labor was performed under a contract in writing made with Henry Burden, an agent of the respondents; and that the amounts and prices thereof, and the payments received by the petitioners, were truly stated in the certificate.

The respondents, among other objections to the maintenance of the petition, contended that neither the furnace stack nor the wall was a "building," within the meaning of *St.* 1851, *c.* 343 § 1; and that the certificate did not contain a just and true account of the balance due to the petitioner, as required by *St.* 1851, *c.* 343, § 2. *Bishop*, J. dismissed the petition, and the petitioners alleged exceptions.

J. E. Field, for the petitioners.

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* "For labor in the preparation of the stone and laying 1272$\frac{11}{22}$ perch in the stack and finishing the same at $3.00 per perch . . $3,818.04

"For labor in preparing the stone and laying 637$\frac{1}{22}$ perch in the walls adjoining the stack at $2.50 per perch 1,642.62

5,460.66

"Deduct cash at sundry times by Stephen R. Gay, agent for Burden 1,817.13

$3,643.53

"The above sum of $3,643.53 is justly due us for such labor after all just credits given."

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I. Sumner & H. L. Dawes, for the respondents.

Bigelow, J. The *St.* of 1851, *c.* 343, § 1, gives a lien only for labor performed in erecting, altering or repairing any building. The petitioners do not confine their claim to a lien for the labor performed in building the furnace, but include also the debt due for erecting the wall near and around the furnace. If the furnace is a building, in the sense in which that word is used in the *Sts.* of 1851, *c.* 343, and 1852, *c.* 307, it is very clear that the wall is not. The word "building" cannot be held to include every species of erection on land, such as fences, gates or other like structures. Taken in its broadest sense, it can mean only an erection intended for use and occupation as a habitation or for some purpose of trade, manufacture, ornament or use, constituting a fabric or edifice, such as a house, a store, a church, a shed. That the word building was used in this sense in the statutes above cited, and did not comprehend every species of erection on land, is strongly implied by *St.* 1855, *c.* 431, in which the word "structure" is added to the word "building," in giving a lien for labor and materials.

The wall in the present case cannot be deemed an essential or integral part of the furnace, necessary to its construction, and making a part of the building, like the wall of a cellar, or the foundation stones of a house. It was not connected with the furnace; it was only an appurtenance or appendage to it, inclosing a portion of the lot on which the furnace was erected, and rendering it less liable to encroachment and injury from the sliding of stones, earth or wood from the side of the hill against which it was built. It is like an embankment or wall, unconnected with a building, but intended to protect it from being undermined by the falling over of earth adjacent to it, or by a stream of water which runs near it.

The certificate filed in the registry of deeds therefore did not contain "a just and true account of the demand justly due to him after all just credits given," as required by *St.* 1851, *c.* 343, § 2. *Lynch* v. *Cronan*, 6 Gray, 531. The petitioners, having failed to comply with the requisitions of the statute in the certificate filed by them, cannot maintain these proceedings.

Petition dismissed.

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William Selkirk *vs.* George H. Cobb.

The striking out by the presiding judge, after the commencement of the arguments to the jury, of incompetent evidence which has been admitted without objection, is no ground of exception.

The title of a principal to goods purchased in his behalf and with his money by his agent without fraud or such conduct in reference to the purchase as to deceive the agent's creditors, is not affected, as against an attaching creditor of the agent, by the agent's having for a long time previous held himself out to this creditor and other persons as dealing on his own account in other similar transactions.

In trover, the measure of damages is the value of the property at the time of the conversion; and if the jury are so instructed, a refusal to instruct them that the plaintiff is entitled to recover only the value at the time and place of conversion is no ground of exception.

Action of tort against a deputy sheriff for the conversion of a quantity of scrap iron, attached by the defendant as the property of John Race.

At the trial in the court of common pleas, before *Bishop*, J., the plaintiff introduced evidence tending to show that Race had been employed, for three years, as the plaintiff's agent for the purchase of iron, and had purchased, in small quanties, the iron in dispute for the plaintiff, with money furnished by the latter. But there was evidence tending to show that no notice had been given that the business in which Race was engaged was done on account of the plaintiff; and that many persons with whom Race dealt believed him to be acting for himself in purchasing iron. One of the attaching creditors testified that the claim upon which the attachment had been made was for seven tons of iron sold to Race in October 1856; that they never knew he was dealing in any way except on his own account; that Race had bought quite extensively, and, at the time the seven tons were purchased, was doing a business which gave him a credit. The defendant testified that he found Race unloading iron at the station at West Stockbridge, and that no intimation was given him that any other person was interested in it.

Two mortgages of personal property from Race to the plaintiff were put in evidence by the defendant, without objection; and other mortgages were offered by him, but were objected to

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by the plaintiff and excluded by the court. In his closing argument to the jury, the defendant's counsel was commenting upon these mortgages, when, upon the plaintiff's objection, the court ordered the two mortgages, and all evidence respecting them, to be struck out of the case.

The defendant requested the judge to instruct the jury, "that even if they found that the iron attached had been purchased by the plaintiff, yet if Race, during the three years in which he had been acting as agent for the plaintiff, had held himself out to the public as a buyer and seller on his own account, and had so dealt with the attaching creditors, and under this supposition they had entrusted their property to him, and given him credit, and this was known to the plaintiff, who permitted it, the plaintiff could not now come in and claim the iron as against the attaching creditors." But the presiding judge declined so to instruct, and instructed the jury "that other transactions between Race and the plaintiff, although they might have been fraudulent, could not affect this suit; that the jury must be satisfied that the conduct of the plaintiff, with regard to this particular lot of iron, had been such as to mislead and deceive the officer as to its ownership; that if they were satisfied that the iron had been purchased by Race, as the plaintiff's agent and with the plaintiff's money, and without fraud upon the part of the plaintiff, and that he had not so conducted himself with reference to this purchase as to deceive the officer, the plaintiff was entitled to recover.

The defendant also requested the judge to rule that if the plaintiff was entitled to recover, "he could recover only the market value of the iron at the time and place of conversion." But the judge declined so to rule, and instructed the jury that "the plaintiff was entitled to recover such sum as upon the evidence they thought the iron was worth at the time of the conversion."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. E. Field, for the defendant. 1. The mortgages and testimony connected therewith, which had been given in evidence

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without objection, were erroneously stricken out by the court, after the commencement of the closing arguments, and when it was too late for the defendant to supply their place with other evidence, which he might have done if they had never been admitted.

2. The instructions asked for should have been given, as to the right of the plaintiff to claim the iron as against these attaching creditors. *Hicks* v. *Cram*, 17 Verm. 449. *Bursley* v. *Hamilton*, 15 Pick. 40. *Kinney* v. *Farnsworth*, 17 Conn. 355. *Roe* v. *Jerome*, 18 Conn. 138. *Cowles* v. *Bacon*, 21 Conn. 451.

3. The rule of damages which was stated by the defendant is the true rule, and should have been adopted. *Wells* v. *Abernethy*, 5 Conn. 222.

J. Branning, for the plaintiff.

Merrick, J. 1. It appears that in the progress of the trial two mortgages of personal property, made by Race to the plaintiff, were produced and read in evidence, without objection. But when, at a later stage, other similar mortgages were produced and offered to be laid as proof before the jury, they were objected to as irrelevant, and were excluded by the court. Afterwards, while the defendant's counsel was making his concluding argument and commenting upon the testimony, the court, upon an objection then interposed by the plaintiff, ordered the mortgages and all the testimony connected therewith to be stricken out of the case.

To this, exception was taken by the defendant; but the exception ought not to be sustained. There was doubtless some irregularity in the proceeding. The attention of the court ought properly to have been called directly to this matter at an earlier stage in the trial. The omission to do so may have been the result of misapprehension as to the extent of the ruling and direction given when the mortgages subsequently offered were objected to and excluded. But whatever was the cause of delay in reference to the objection to the admissibility of the two first mentioned mortgages, there is no reason why they should have been allowed to have an influence upon the final determination of the questions at issue between the parties, since they were

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manifestly incompetent for that purpose. This is now conceded by the defendant. He does not complain that he was deprived of the advantage of any legal and admissible evidence; but only that certain facts, which had been laid by him before the jury without objection, and which had no competency whatever as proof in the case, were withdrawn by order of the court from their attention. If the objection had been that, in consequence of the reception of the mortgages in evidence without objection, the course of the trial had been in any degree varied, on the part of the defendant, so that a formal withdrawal of them at a subsequent stage would have operated as a disadvantage to him, he might have had a just ground of complaint. But nothing of this kind appears. His alleged grievance is, that he was not permitted to avail himself of the proof concerning these mortgages; that is, that he was not allowed to influence the jury and procure a verdict by means of evidence not admissible, or allowable by law. It would be alike unreasonable and unjust, that such a complaint should be sustained. There should undoubtedly be care and vigilance to prevent such irregularity as that which occurred on the trial; but if it be found that by some inadvertence it had happened, it would be the duty of the court to correct it as soon as possible, and then explain the whole matter to the jury in such way as to make it sure that the rights of neither party should be affected by it. As it is not pretended that there was any want of proper and suitable explanations upon this subject, it may be presumed that all proper and necessary advice and instructions were given to the jury to prevent any possible injury to either party by the course which was pursued.

2. The refusal of the presiding judge to adopt and give to the jury the instructions suggested by the defendant must be considered, in view of the rule which was in fact laid down for their guidance, to have been correct. The question to be determined was, to whom the scrap iron, which was the subject in controversy, belonged. If the plaintiff, through the agency of Race, had purchased it and paid for it with his own money and had come into possession of it, and had in no respect been guilty of fraud in relation to the transaction, it was certainly his, and no

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one could justly contest his right to it. And this was the direction in matter of law that was given to the jury. Other transactions, though fraudulent as against the creditors of Race, could not invalidate this, if it was obnoxious to no such objection. We do not understand that the jury were excluded from considering the evidence with respect to the conduct and course of dealing of Race during the preceding three years, and the knowledge of it by the plaintiff, as it bore upon the question whether the property in dispute was attachable by his creditors as the property of Race, on the ground that it was fraudulently conveyed to the plaintiff. This they were allowed to do; but in the end, after weighing all the evidence, they were finally to determine whether the plaintiff had fairly and without fraud become the owner and possessor of the iron before it was taken on legal process by Cobb as the property of Race. Though his creditors may have been deceived or misled in reference to other property or other transactions, by the conduct or course of dealing of Race or of the plaintiff, yet if they were not in relation to this specific property, they have not been injured, or deprived of any just or legal advantage, of which they ought to have had the benefit. They could not interfere with the rights of the plaintiff, honestly and fairly acquired in this instance, although there may have been just ground of objection to his transaction in other negotiations.

3. The rule is perfectly well established, that in actions of tort for the seizure and conversion of personal property, the measure of damages is its value at the time of the conversion. This was so stated by the court in its directions to the jury, which were therefore in that particular entirely correct. The additional qualification, asked for by the defendant, that the market value of the property at the place where it was converted should be taken into consideration, was properly refused. "Place," as used in this connection, was indefinite and uncertain. If adopted, it might have misled the jury by its being supposed to limit them in ascertaining the value of the property to inquiries as to sales made on the precise spot where the conversion took place, or its immediate vicinity. Within such a circum-

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scribed range, it may have been impossible to find that the property had there acquired any marketable value. It is sufficient that the true and established rule of law upon the subject was distinctly stated as the basis upon which the verdict ought to be rendered. *Exceptions overruled.*

HENRY D. SMITH *vs.* INHABITANTS OF CHESHIRE.

Orders for money, made payable to bearer, drawn by the selectmen of a town and accepted by the town treasurer, without express authority of the town, will not render the town liable to an action in the name of any one other than the person to whom they were issued.

ACTION OF CONTRACT by the plaintiff as bearer of several similar orders, of one of which this is a copy:

"$10.00. To H. P. Brown, treasurer of the town of Cheshire. Pay Riley Westcott or bearer ten dollars, and this shall answer you in settlement with the town. Cheshire, December 22d 1855.

Thomas B. Brown, } Selectmen
Ward B. Wood, } of Cheshire.

"Accepted February 23d 1856. H. P. Brown, treasurer."

At the trial in the court of common pleas, the plaintiff gave in evidence the orders declared on; and the parties agreed that the orders were signed by the selectmen of Cheshire and accepted by the town treasurer, and were delivered to the payees by John W. Howland, who was at that time a collector of taxes of the town, and indebted to the town in a sum of money much greater than the amount of these orders, and who, before this action was brought, had been sued upon his bond for the whole amount due from him to the town.

The defendants objected to the maintenance of the action, because there was no proof that any authority to draw and accept these orders had been conferred on their selectmen and treasurer; and because those officers were not authorized by law to make and accept such orders. *Briggs*, J. overruled the objection, the jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

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J. T. Robinson, for the defendants.

J. C. Wolcott, for the plaintiff.

BIGELOW, J. It is quite common for selectmen of towns to draw orders like those set out in the declaration, payable to order or bearer. This is a convenient practice, and one to which we see no objection. Such orders operate as an authority to the treasurer to pay and the holder to receive the amount for which they are drawn. But the right of the plaintiff to sustain this action depends, not on the form in which the orders are drawn, but on the question whether the orders declared on are negotiable, so that a suit may be maintained on them by an indorsee, or other person, not the payee, who is the holder of them for value. The decision of this question depends on another, which is, whether the selectmen of a town in this commonwealth have power, by virtue of their office, without any special authority from the town, to issue to persons having claims on the town negotiable notes, bills of exchange or orders on which a town can be held liable to indorsers or holders other than those to whom they were originally issued.

The powers and duties of selectmen are not very fully defined by statute. Many of the acts usually performed by them in behalf of towns, and which are recognized as within their appropriate sphere, have their origin and foundation in long continued usage. The management of the prudential affairs of towns necessarily requires the exercise of a large discretion, and it would be quite impossible by positive enactment to place definite limits to the powers and duties of selectmen to whom the direction and control of such affairs are entrusted. Speaking generally, it may be said that they are agents to take the general superintendence of the business of a town; to supervise the doings of subordinate agents, and the disbursement of moneys appropriated by vote of the town, to take care of its property and perform other similar duties. But they are not general agents. They are not clothed with the general powers of the corporate body for which they act. They can only exercise such powers and perform such duties as are necessarily and properly incident to the special and limited authority conferred on them

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by their office. They are special agents, empowered to do only such acts as are required to meet the exigencies of ordinary town business.

This view of the extent of authority of selectmen as agents of the town is decisive of the question on which this case turns. The rule of law is well settled, that a special agent has no authority to bind his principal by a promissory note, bill of exchange or other negotiable paper. Such power can be conferred only by the direct authority of the party to be bound. To this rule there is but the single exception that such authority may be implied where it is essential to the performance of the particular duty with which an agent is specially charged. The policy of the law regulating the relation of principal and agent is to restrain the power of the latter to bind the former by negotiable paper. The reason is that the unrestricted exercise of such a power changes and enlarges the liability of the principal beyond that which he would incur under a contract which could be enforced only in the name of the party with whom it is made. Therefore it has been held that an agent who has authority to pay the debts of his principal, to disburse his moneys, to settle with his creditors, or even to bind him by a contract or agreement to pay money, is not authorized to sign negotiable paper by which his principal will be bound. *Taber* v. *Cannon*, 8 Met. 458. *Paige* v. *Stone*, 10 Met. 168.

This well established restriction on the power and authority of agents is particularly applicable to public agents, especially to those acting in behalf of towns. It would lead to dangerous results, if selectmen might at their pleasure issue negotiable paper on which the town might be held liable to any person to whom it might be passed. It would enable them to pay creditors of the town by notes to an amount not restricted by the votes or appropriations regularly made for municipal purposes. The town would be liable to indorsees on such notes without any power to inquire into the considerations between them and their original creditor, or to avail themselves of any payment, set-off or other equity which they might otherwise rely on in defence to the claim.

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The nature and extent of the liability of the town on these orders is not enlarged by the acceptance of the treasurer. His authority as an agent of the town is limited to the receipt and payment of money, and does not include any power to enter into contracts binding on the town.

In the present case, the orders declared on purport to be issued by the selectmen, and accepted by the treasurer, as agents for the town. The plaintiff took them therefore with full notice of their origin and character. If he is the *bona fide* holder of them, his remedy to enforce them is by an action in the name of the person to whom they were issued, as in the ordinary case of a suit by the assignee of a chose in action.

Exceptions sustained.

INHABITANTS OF CHESHIRE *vs.* JOHN W. HOWLAND & others.

It is no ground of exception to the admission in evidence of an auditor's report at a trial before the jury, that the auditor appointed a time and place for the hearing, which were not convenient to the counsel of the party excepting, as the counsel of the other party knew.

Payments made by a collector of taxes in behalf of the town, and allowed to him by the town in account, cannot be again allowed him in an action by the town on his official bond.

In an action by a town on the bond of its collector of taxes, amounts paid by the collector on negotiable orders drawn by the selectmen upon him cannot be credited to the defendants.

Assessors have no power to abate a tax after their term of office has expired.

In an action upon a collector's bond, interest is to be allowed upon the amount due from the time of a demand upon the collector.

A collector of taxes is not responsible to the town for not collecting taxes under a warrant illegal upon its face.

A warrant to a collector of taxes, which directs him to collect the amount of a highway tax "in money or receipts from the surveyor of highways," is unauthorized by law.

ACTION OF CONTRACT upon the bond given by Howland as collector of taxes of Cheshire for 1855. Trial in the court of common pleas before *Bishop*, J., to whose rulings the defendants alleged exceptions, the substance of which is stated in the opinion.

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J. C. Wolcott & J. N. Dunham, for the defendants.

J. T. Robinson, for the plaintiffs.

HOAR, J. 1. The defendants except to the ruling of the judge before whom the case was tried in the court of common pleas, allowing the report of an auditor to be given in evidence to the jury; because the auditor appointed a time and place for one of the hearings before him which were not convenient to the defendants' counsel, of which fact the counsel for the plaintiff was informed. It appears that the defendants' counsel were not present at the hearing, but the auditor proceeded in their absence, and made his report.

This exception cannot be sustained. If the counsel, being seasonably notified of the time appointed, could not attend, they should have applied to the auditor to change the time, or for a further hearing. If he had refused, unreasonably, application should then have been made to the court by whom the auditor was appointed, to recommit the report, or to set it aside; and this application should have been made before the trial. If the application had been seasonably made, the decision of the judge upon it would have been upon a matter within his judicial discretion, and not a subject of exception. The auditor's report, therefore, made a *prima facie* case for the plaintiffs, to recover the amount reported to be due to them.

2. The evidence in regard to the note produced by the defendant was rightly admitted. It was a note signed by the selectmen of Cheshire as the agents of the plaintiffs, and by the defendant Howland as surety. His claim was, that the money he had paid upon it was so much money paid to the use of the plaintiffs upon their debt. The evidence admitted by the court was to show that this sum had already been allowed him in account. If this were true, it would be the best of reasons why it should not be allowed to him again.

3. It appeared that certain "town orders," that is, orders drawn by the selectmen upon the town treasurer, in favor of persons to whom the plaintiffs were indebted, and made payable to such persons or bearer, had been paid by Howland, the collector, to the persons in whose favor they were drawn, and

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had afterward been transferred by him to other persons, who had commenced actions upon them against the town. It is very clear that these "orders" should not have been credited to the defendants in this action. No authority was shown for Howland's paying them as the agent of the plaintiffs. He did not have them in his possession at the trial. We have decided at this term that an action could not be maintained upon them by the persons to whom they had been transferred, in their own names; because selectmen have no authority, by virtue of their office, to make such negotiable instruments on behalf of their town. *Smith* v. *Cheshire*, *ante*, 318. It is probably a common practice for collectors of taxes to receive and pay such orders, and have them allowed to them in their settlements with the town. The transfer of the orders to the collector might operate as an assignment to him of the demands against the town in favor of the persons to whom the orders were first given. If this were so, his transfer of them to another would be an assignment by him of the same demand, which, never having been paid by the town, would remain as a valid claim to be enforced for the benefit of the assignee, by an action in the name of the original creditor.

4. The next ground of exception is, that the amount of taxes named in the certificate of abatement given to the collector on the 18th of December 1857, by the assessors for 1855, was not allowed him by the auditor, and that the certificate of abatement was rejected as evidence at the trial. This exception cannot prevail. We are of opinion that the assessors had no authority to make an abatement of taxes after their term of office had expired. The office of assessor is an annual office. The statutes relating to the assessment of taxes all contemplate that the duty of the assessors shall be completed within the year. There is no express provision of law, authorizing them to do any act after their term is ended; nor is there any necessity for such an extension of their powers as would give such authority by implication. No person is entitled to an abatement of his tax, who does not apply for it within six months after it is assessed upon him. Rev. Sts. *c.* 7, § 41. The whole policy

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of the law contemplates a prompt performance of their duties on the part of assessors. The power of a collector to complete the collection of taxes after his term of office has expired is directly conferred by statute. Rev. Sts. c. 8, § 2. The town may abate a tax by vote after the year has expired. Rev. Sts. c. 8, § 43.

5. Interest was rightly allowed from the date of the demand upon the collector to pay over the amount due from him to the town. It was a specific sum of money, which the town had a right to receive at the time it was demanded. Its detention from that time was wrongful, and the law gives interest, in the nature of damages, for the detention.

6. The only remaining ground of exception is, that, by the auditor's report, the defendants were charged with the sum of $826.38, the amount of a highway tax for 1855, which was committed by the assessors to Howland for collection, by a warrant which directed him to "collect the sum of $826.38 in money or receipts from the surveyors of said Cheshire, it being the highway tax 1855;" and that such direction was not authorized by law, and therefore the failure of the collector to obey it, or to account for the money received upon it, could not be regarded as a breach of official duty, for which his sureties would be responsible; but that the presiding judge refused to instruct the jury to disallow the charge. We think this objection must prevail. A warrant, not upon its face authorized by law, imposes no official obligation upon the collector. If he actually collects money which the town is justly entitled to receive, he may be responsible for the sums collected. But he cannot be charged with the amount of the tax, merely upon proof that it was committed to him, under such a warrant, by the assessors.

The case of *Sandwich* v. *Fish*, 2 Gray, 298, cited by the plaintiffs' counsel, was a case where the town sought to recover of a collector and his sureties upon his bond the amount of money which the collector had received from the taxpayers, under a warrant which, the defendants contended, was irregular and not authorized by law. Although the court held, that the

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irregularities there shown would afford the collector no protection against the claim for money he had actually received, yet it is expressly stated in the opinion that the collector would be under no obligation to execute a warrant not sufficient on its face. The taxpayers may undoubtedly waive any defects in the warrant which are merely formal; but their waiver cannot require the collector to proceed with the execution of a warrant which the assessors had no right to issue. The condition of the bond is, "to account for and pay over all the taxes which he shall be legally required to collect."

The provisions of law for the collection of highway taxes differ in some respects from those which relate to other taxes. The town may raise a tax in money for the maintenance of highways, to be collected and paid in the same manner as other town taxes. Where this is done, there is no power in the assessors to issue a warrant for its collection "in surveyor's receipts" in whole or in part. But the town may raise a highway tax, to be worked out by the taxpayers at their election, under the direction of the highway surveyors, after such notice as the statute requires. Where this is the mode adopted, the warrant from the assessors is to issue, or lists are to be furnished, in the first instance, to the surveyors; and it is only against those who have refused or neglected, upon proper notice, to furnish their proportion of labor and implements within the time allowed them, that a warrant can lawfully issue to the collector to collect the tax in money. When such a warrant issues, it is after the time within which the taxpayers could lawfully "work out" the tax, according to the common phrase; and it must issue only against the delinquents, and can be only for the payment of money. The warrant before us, by its terms, seems to contemplate a future determination of a fact, which should have been definitely ascertained in the mode provided by law, before the warrant was issued. Rev. Sts. *c.* 25, §§ 8–16. It is therefore not, in any view, a warrant by which the collector was "legally required to collect" a tax, and the rulings of the court below were so far erroneous.

But as the error only affects a single item of the account, i

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will not be necessary to set aside the verdict, if the plaintiffs will remit the amount which has been improperly allowed to them. It appears that the surveyor's receipts, which were taken by the collector, have been credited to him in the account.

If therefore the plaintiffs choose to remit from their verdict the sum of $826.38, except the amount of the surveyor's receipts which have been credited, and interest upon the remainder from July 1st 1856, to the time of the verdict, judgment will be entered upon the verdict; otherwise, the verdict will be set aside, and a new trial ordered in the superior court.

Nehemiah Palmer *vs.* Charles D. Palmer & another, Administrators.

The occupation of real estate of an intestate by one of his two administrators, who is also one of his heirs, without paying or charging himself with any rent, is not of itself a bar to granting a petition for leave to sell real estate for the payment of debts.

The lapse of four years is no bar to granting the petition of an administrator for leave to sell real estate of his intestate for payment of a debt to the administrator, if the administrator has been guilty of no laches.

The fact that an administrator's account is still unsettled is no bar to his petition for leave to sell real estate of his intestate for payment of debts.

Appeal from a decree of the court of probate, granting the petition of Charles D. Palmer and Nathan Palmer, administrators of Henry Palmer, for leave to sell real estate of their intestate for the payment of a debt due said Charles, and ascertained by a decree of this court in May 1851 to be $5,313.42 and four years' interest. Hearing before *Dewey*, J., who reported for the consideration of the full court the following matters relied on by the appellant as grounds for denying the prayer of the petition:

1st. The appellant offered evidence tending to show that said Charles (who was one of the heirs of the intestate, and as such entitled to one tenth part of the real estate) had occupied and improved the whole of the real estate ever since the death of the intestate, and taken the profits, amounting to $350 or $400

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annually, to his own use; and had not charged himself with any part thereof in his own accounts, or paid any rent to his co-heirs; but denied any liability to them therefor.

2d. The appellant contended that as the petitioners were appointed administrators in 1848, and the debt in question was a judgment recovered in May 1851, and this petition was not presented until the 6th of February 1856, the right to a license was barred by lapse of time.

3d. The petitioners in 1853 had rendered an account, in which they claimed to have accounted for all the personal estate, and to leave a balance due them besides the debt to said Charles. Upon the rendering of this account an order of notice was issued, and the parties appeared and were heard before the probate court for and against the account; but no final adjudication had been made thereon.

I. Sumner & J. E. Field, for the appellant. 1. The administrators should have accounted for the use of the real estate. Rev. Sts. *c.* 67, § 6. *Stearns* v. *Stearns*, 1 Pick. 159. *Gibson* v *Farley*, 16 Mass. 280.

2. The claim of the petitioners was barred by lapse of time. *Allen, petitioner*, 15 Mass. 58. *Wellman* v. *Lawrence*, 15 Mass. 326. *Richmond, petitioner*, 2 Pick. 567. *Heath* v. *Wells*, 5 Pick. 139. *Hudson* v. *Hulbert*, 15 Pick. 423. *Brown* v. *Anderson*, 13 Mass. 201. *Scott* v. *Hancock*, 13 Mass. 162. *Ricard* v. *Williams*, 7 Wheat. 116. *Nowell* v. *Nowell*, 8 Greenl. 220. *Smith* v. *Dutton*, 16 Maine, 308. *Fitch* v. *Witbeck*, 2 Barb. Ch. 161. *Campau* v. *Gillett*, 1 Mich. 416.

3. No license should have been granted to sell the real estate of the intestate, until the account of the administrator had been passed upon by the court of probate. Rev. Sts. *c.* 71, §§ 1, 3. *Nowell* v. *Nowell*, 8 Greenl. 220. *Wheeler* v. *Wheeler*, 1 Conn. 51. *Jackson* v. *Robinson*, 4 Wend. 436. *Stiers* v. *Stiers*, Spencer, 52. *Snyder* v. *Markel*, 8 Watts, 416. *Corwin* v. *Merritt*, 3 Barb. 341. *Scheider* v. *McFarland*, 4 Barb. 139. *Sanford* v. *Granger*, 12 Barb. 392. *McDonald* v. *Hutton*, 4 Halst. Ch. 473.

J. D. Colt, for the appellees.

Hoar, J. We are all of opinion that the occupation of

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the real estate of the intestate by one of two administrators, who is also one of the heirs, is not of itself a bar to the granting the prayer of this petition for leave to sell real estate for the payment of debts. Strictly, an administrator has nothing to do with the real estate of his intestate, except to execute the power to sell it for the payment of debts, when it is necessary to do so, and he has obtained the requisite authority. But as, in practice, it is sometimes found that by an arrangement with the heirs he takes the profits of the whole or some part of it for the benefit of the estate, the statute requires him to account for what he may so receive, as assets in the course of administration. In the report in this case, we do not find that any such agreement or arrangement was made. But whether it was made or not is a fact to be decided, if in dispute, upon the settlement of their administration account by the petitioners. If they have thus occupied the estate, in their capacity of administrators, they must account for the rents and profits which they have received; but if one of the heirs has been in possession, the fact that he is also one of the administrators will not impose upon him the obligation to account for profits which any of the heirs may rightfully take and retain, so long as their title to the estate is not devested by a sale under authority of law.

2. The lapse of time is not necessarily a bar to the petition; and, under the circumstances stated in this report, cannot, we think, prevail as an objection to it. The questions to be determined upon the petition are, whether the real estate is needed for the payment of debts, and whether it ought to be regarded as assets, to be disposed of by the administrators for that purpose. If four years under the old statute, or two years as the law now stands, have elapsed since the appointment of the administrator, and no debts exist but those claims against which the statute of limitations would furnish complete protection, then the real estate is not needed for the payment of debts, and a license to sell it cannot be granted.

If the only claims against the estate are those of the administrator himself, the amount of which he is entitled to retain from

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the estate in the settlement of his account, and the administrator has negligently omitted to apply for leave to sell the real estate, until the four years or the two years have expired, and has suffered the heirs to make partition of the real estate, or to make conveyance of it, under the reasonable belief that it would not be wanted for the payment of debts, a license to sell would not be granted; because the lien upon the real estate is not to be perpetual, and the administrator, by his own laches, would have entitled the heirs to consider it terminated. *Hudson* v. *Hulbert*, 15 Pick. 423.

But in the case before us, there does not appear to have been any change in the property; nor is there any equity which should defeat the right of the administrator to have his debt satisfied by a sale of the real estate. Until the administration account is settled, it is difficult to determine how much of the real estate it will be necessary to sell, although it is certain that some of it must be sold. Indeed one of the points taken by the respondents is, that this petition is premature, and cannot be supported until the administration account is settled. Although we have not so decided, the litigation upon the account would at least show that, in the view of both parties, there was a good reason why this petition was not sooner presented.

3. We do not think that the fact, that the administrators have not settled their account, is in itself a bar to this petition. It would be so if, the account having been seasonably rendered, it depended upon its allowance whether any sale of real estate would be requisite. But in some cases the necessity of a sale might be apparent, and the occasion for it pressing, however the account should be settled. It would be so in the case of an insolvent estate, where the whole real estate should be insufficient to meet the acknowledged deficiency in the personal estate. But in the case at bar, although it is certain that a sale must be allowed, yet, as the account is now under process of settlement in the probate court, we think that it will be expedient to delay action upon the petition until it shall be settled.

The court therefore order and decree that the petition be remitted to the probate court, there to be continued until the

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administrators' account shall have been settled, and then that the prayer thereof be granted, and a license given to sell so much of the real estate as shall be needed to satisfy that amount of the debt due to the administrator, which shall not be satisfied from the personal estate.

Daniel Crippen *vs.* Almira C. Dexter.

A decree of a probate court of another state, admitting to probate a will within its jurisdiction, is conclusive evidence, if duly authenticated, of the validity of the will, upon an application to prove it in this state; even when no notice of the offer of the will for probate was given, if by the law of that state no such notice was required.

Shaw, C. J. This is an appeal from the decree of the judge of probate, allowing a copy of the will of Beulah Crippen, deceased, proved and allowed by the probate court for the District of Salisbury and State of Connecticut, together with an authenticated copy of the probate thereof, to be filed in the probate court of this county, and letters testamentary to be issued thereon. The case comes before this court upon the report of Mr. Justice Dewey, by whom the appeal has been heard.

It appears that Daniel Crippen, the appellant, is the son and heir of the testator; it does not appear whether his domicil is in Connecticut; but we think it was argued upon the assumption that it was not. It is conceded that there is real estate in the county of Berkshire, on which this will, if established, will operate.

The following is a synopsis of the reasons of appeal: 1. The will is not the last will of said Beulah; 2. She was not of sound mind; 3. Undue influence; 4. The undue influence of Almira C. Dexter, who now seeks to have the will recorded; 5. The will was never duly allowed and proved in Connecticut; 6. No notice of the probate was given to the heirs or others; 7. The will was not duly and legally made, executed, proved and allowed in Connecticut or this state; 8. The copy was not duly authenticated; 9. No proof of any estate on which this

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will would operate; 10. Generally, that all the orders and proceedings were erroneous.

It has long since been determined, as the law of this commonwealth, that one probate of a will only shall be allowed or admitted, as well in its operation upon devises of real estate, as on bequests of personal. In this last respect, it varies from the rule of the common law, which makes a marked distinction between a will of real, and one of personal estate.

The importance of making proof of a will, once for all, and for all purposes, must be obvious. It determines the *status*, if it may be so called, the condition of a deceased person's estate. It must be settled as an estate testate or intestate. The establishment of the one necessarily excludes the other. The modes of administration are so distinct, from the commencement to the termination, operating upon the same property, real and personal, administering the same assets, that it is impossible that an estate should be settled partly by an executor under a will, and partly by an administrator under an intestacy. The same principle is acted upon by the English law, with the exception of devises of real estate, which are regarded as a species of conveyance, because real estate is in no respect under the jurisdiction of the ecclesiastical court, which has the exclusive jurisdiction of the probate of wills and the settlement of estates. But it is otherwise in Massachusetts. It is therefore distinctly provided by our law that a will proved in any county, either by a decree of the probate court, unappealed from, or by a decree of the supreme court of probate on appeal, is final and conclusive in regard to all property within the Commonwealth or under its jurisdiction.

It has been the policy of this commonwealth, for the like reason, to give force and effect to a will made and executed in other states, when there is property in this state on which it may operate. It is therefore provided, by the Rev. Sts. *c.* 62, §§ 17–20, that a will proved in another state, with the probate thereof duly authenticated, may be presented to the court of probate of this state; and after notice, hearing, and due proceedings thereon, if it shall appear to the judge that it ought to be allowed, it may be received and ordered to be recorded; with

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this proviso, that this statute shall not be so construed as to make valid any will, not executed, attested and subscribed in the manner prescribed by the laws of this state. But even this last exception has been repealed by *St.* 1843, *c.* 92. This law gives the same force and effect to a foreign, as to a domestic will, if made in conformity with the laws of the state or country where it was executed, and which might be proved and allowed according to the laws of such state or country. *Bayley* v. *Bailey*, 5 Cush. 245.

This statute gives effect to the will of any inhabitant of this commonwealth made in any other state or country, and also to the will of an inhabitant of any other state or country, not made in this commonwealth, and authorizes an original probate thereof, in case there is property in this commonwealth on which it may operate.

This statute does not in terms apply to a will made and proved in another state or country; but with other acts of legislation, it tends to confirm a general course of policy, to consider one effectual probate of a will, whether in our own or in a foreign state, according to the laws of such state, as conclusive and effectual, to all purposes.

The judgment of a probate court, allowing proof of a will, and admitting it to probate, is to some extent like a proceeding *in rem*, binding upon the rights of all persons interested in the property to be administered, though they are not named as parties. In this respect, therefore, the final judgment of a court having jurisdiction of the subject matter may be rightly held to be conclusive. Still, however, when a copy of a will, with an authenticated copy of the probate thereof in another state, is offered to a court of probate in this state for record, there is something for the latter to do. Rev. Sts. *c.* 62, § 18 *& seq.* It is to assign a time and place for hearing parties, and give public notice. If, on hearing the case, it shall appear to the judge that the instrument ought to be allowed in this state, as the last will and testament of the deceased, he shall order accordingly.

Here a discretionary power is vested in the probate court; but it must be regarded as a judicial discretion. The judge must,

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we think, decide whether the record presented is duly authenticated; whether the court, in which the will purports to have been allowed, had jurisdiction; and whether there is any estate, real or personal, in his county, on which such will may operate. Perhaps some other questions may be open on this inquiry — actual fraud in obtaining the probate of the will, for instance — but of this there is no occasion to express an opinion in the present case. But as to all those facts which are necessary to the establishment of a will, in whichever form the case is entertained, and as to the regularity of the proceedings and their conformity to the law of the state or country where they are had, the judgment itself must be held conclusive; it is required by the rule of the Constitution of the United States, which requires that the acts and judicial proceedings in one state shall be respected in the courts and tribunals of others; and by the rule of the common law, giving effect to judgments of other states, where they have a peculiar jurisdiction in case of proceedings *in rem*, and have custody of the subject matter.

It has been so determined as to the capacity and sanity of the testator, the due execution of the will, the competency of the witnesses and regularity of the probate proceedings. *Dubtin* v. *Chadbourn*, 16 Mass. 433. So where the special capacity of a testator is necessary to making a valid will, as in case of a feme covert, the allowance of the will affords a conclusive presumption that such proof was given. *Parker* v. *Parker*, 11 Cush. 519.

In the present case, most of the objections taken by the appellant are not open to him here. The one most relied on, and which at first seemed to require serious consideration, was that no notice was given by the probate court of Connecticut of the time and place for the proof of this will. But it being found that by the law of Connecticut no formal notice is required, the legal ground of opposition is removed, because it would not invalidate the probate of the will there. If it be objected that such a law itself is unreasonable and ought not to be sanctioned elsewhere, it becomes a question whether such theoretic defect in the general law is likely, practically, to work injustice. A

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man dying, having property, usually dies within the knowledge of his kindred; the death itself is a fact of some notoriety in his neighborhood, and through the circle of his associates; proceedings for the settlement of his estate of necessity soon follow, and may be easily known to those most interested, so that actual knowledge of the proceedings will generally be had. In case of any failure on the part of those interested, who had intended to oppose and resist the probate, the law of Connecticut affords ample time to appeal; eighteen months to a resident inhabitant, and three years to a non-resident. Besides, though the law does not require notice in all cases, yet a court of probate, by the nature of its functions, has authority to order personal or public notice to heirs at law and all interested; and it may be presumed that it will do so, where the circumstances are such as to require it. The law is to be regarded as a whole, and in reference to its practical operation; and in this view, perhaps, the law is not unreasonable in allowing the proof of the will without formal notice, in cases where opposition is not to be expected, allowing ample time for an appeal. If it be said that this consideration cannot apply to heirs and persons living out of the State, the answer is, that a conventional state line cannot prevent the circulation of actual knowledge of notorious facts; that though the appellant did not live in the same state with his mother, yet he might live in an adjoining town, and for aught that appears knew of her death and of the settlement of her estate. If, therefore, the objections which he now makes to the sanity of his mother, the execution of her will, or that it was made under undue influence, were then known to him, his remedy was to oppose the probate at Salisbury, Connecticut; or if in point of fact he had no opportunity to do so, then to appeal. If he was an inhabitant of Massachusetts, his right of appeal had not expired when this decree was made.

In regard to the other objections, we think it very clear that the probate court of Connecticut had jurisdiction. The testatrix was an inhabitant of Salisbury, had her domicil and died there, and the probate proceedings were had there.

An objection was taken, in the reasons of appeal, to the suffi

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ciency of the authentication of the record of the probate court of Connecticut; but no specific objection was pointed out to the judge before whom this appeal was heard, and none was referred to this court by his report. It was a matter of form, and, if defective and the defect seasonably shown, it might have been amended.

Decree of the probate court of this county affirmed.

I. Sumner, for the appellant, cited Rev. Sts. *c.* 62, §§ 17–19; *Dublin* v. *Chadbourn*, 16 Mass. 433; *The Mary*, 9 Cranch, 126; *Oakley* v. *Aspinwall*, 4 Comst. 514; *Starbuck* v. *Murray*, 5 Wend. 148; *Holbrook* v. *Murray*, 5 Wend. 161; *De Witt* v. *Burnett*, 3 Barb. 89; *Ewer* v. *Coffin*, 1 Cush. 23; *Woodward* v. *Tremere*, 6 Pick. 354; *Hall* v. *Williams*, 6 Pick. 240; *Slasson* v. *Brown*, 20 Pick. 440; *Corliss* v. *Corliss*, 8 Verm. 389; *Kibbe* v. *Kibbe*, Kirby, 119.

B. Palmer, for the appellee.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF HAMPSHIRE AND FRANKLIN, SEPTEMBER TERM 1859, AT NORTHAMPTON.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. GEORGE T. BIGELOW,
HON. EBENEZER R. HOAR,
} JUSTICES.

SAMUEL HENRY *vs.* SAMUEL B. ESTEY, Administrator

The fact that an administrator gave public notice of his appointment may be proved by oral evidence, as well as by an affidavit of the administrator filed and recorded pursuant to the Rev. Sts. *c.* 66, § 2, and *St.* 1855, *c.* 182.

A creditor of the estate of a deceased person cannot appeal from a decree of the court of probate, refusing the petition of the administrator for leave to sell real estate of the deceased for the payment of debts.

APPEAL from a decree of the court of probate for the county of Hampshire, upon a petition of the administrator of Joseph W. Estey for leave to sell real estate of the deceased for the payment of debts. The court of probate refused leave to sell for the payment of the appellant's debt, upon the ground that

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it was barred by the special statute of limitations before the petition was presented; but granted leave to sell for the payment of other debts.

At the hearing in this court, it appeared that no affidavit of the administrator, that he had given notice of his appointment, as required by the Rev. Sts. *c.* 66, § 1, had been filed and recorded by him, pursuant to the Rev. Sts. *c.* 66, § 2, or *St.* 1855, *c.* 132. But *Dewey*, J., against the objection of the appellant, allowed that fact to be proved by the testimony of other witnesses, and reported the case to the full court.

E. Dickinson, for the appellant.

S. T. Spaulding, for the appellee.

Dewey, J. We see no objection to the competency of the evidence offered to establish the fact that public notice had been given by the administrator of his taking administration on the estate of the intestate, as is required by the provisions of the Rev. Sts. *c.* 66, § 1. The succeeding section of the same chapter, providing a mode of perpetuating the evidence of such notice by filing an affidavit, is merely a cumulative provision for the benefit of the administrator, if he chooses to avail himself of it; but, upon his failure so to do, does not preclude him from resorting to other evidence to establish the fact of such notice having been given. The subsequent legislation by *St.* 1855, *c.* 132, has not affected this; but merely gives increased facility for securing the full benefit of filing an affidavit by the administrator, on proof of having given such notice.

The present petition must however be dismissed on other grounds. It now appears to the court that this appeal is not prosecuted at the instance, nor with the consent of the administrator, but solely by one Samuel Henry, a creditor of the intestate. But a creditor has no such distinct interest in such petition, that he can prosecute the same independently of the administrator. The creditor can only proceed by a suit against the administrator to enforce his claim. A license to sell real estate for the purpose of paying the debts of the deceased is granted solely on the petition of the administrator, and upon his application therefor, and a creditor is not so far a party

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thereto that, upon the refusal of the judge of probate to grant such license, the creditor can prosecute an appeal therefrom to this court.

We think the proper order of this court must therefore be, that no further proceedings be had upon this petition; but that it be certified to the probate court, that it appearing that the administrator declines to prosecute this appeal, and has signified to this court that he desires no further proceedings thereon, the same is remitted to the probate court to carry into effect the order of that court.

Isaac B. Palmer & others *vs.* Lucian B. Williams & another.

A debtor, shortly before a debt became payable, wrote to the creditor, asking for an extension of twelve months, and received this reply: "I am satisfied with the determination you express to secure and to pay your indebtedness at a stated time. But so small amount as mine I should feel willing to extend twelve months. If you have many editors here, there ought to be a concert of action between you and them." *Held*, that this did not show an assent to the proposed extension.

Action of contract for goods sold and delivered in April 1857 by the plaintiffs, doing business in Boston, to the defendants, doing business in Huntington in the county of Hampshire. Writ dated December 7th 1857. Answer, that the price was not due when this writ was sued out.

The parties submitted the question raised by the pleadings to the decision of the court upon the following statement of facts:

On the 24th of October 1857, shortly before the plaintiffs' claim would have become payable, the defendants wrote to the plaintiffs, asking for an extension of twelve months, and offering, if the plaintiffs preferred, to pay their claim in baskets.

On the 28th of October the defendants wrote again to the plaintiffs, acknowledging receipt of their letters, stating that they desired to pay in full, and should be able to do so if allowed an

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extension; and that their property should be applied equally to the payment of all their debts.

On the 30th of October the plaintiffs wrote to the defendants this letter: "Yours of the 24th came to hand this morning. In answer, we would say that we are satisfied with the determination you express to secure and to pay your indebtedness at a stated time. But so small amount as ours we should feel willing to extend twelve months. If you have many creditors here, there ought to be a concert of action between you and them."

On the 3d of November one of the defendants, in answer to this, said: "It gives us pleasure to say that, so far as we have heard, our creditors express an entire willingness to extend us what we ask, and as at this time seems necessary;" and inclosed a promissory note, payable in twelve months, for the debt and interest.

The plaintiffs immediately returned the note, offering to receive a note at six months at six per cent. from the maturity of the account, but declining to agree to a longer extension.

Said defendant answered: "I inferred, from your favor of the 30th, that what we proposed was satisfactory to you; and would not have presumed to have sent you the note, unless I had so understood it. If I could have seen any reasonable practicability of my being able to pay the notes in six months, it would have been more satisfactory to me to have them renewed for that time; but, for reasons already explained, we shall not get money to pay notes in six months."

The plaintiffs replied: "We cannot give an extension of one year. We prefer to consider it a downright failure, and make a discount, or we will take a six months' note."

It is agreed that the plaintiffs would testify that, in their letter dated October 30th, two words were accidentally omitted, namely, after "But," the word "on," and after "should," the word "not;" so that the whole sentence should read: "But on so small an amount as ours we should not feel willing to extend twelve months." The defendants object to the competency of this evidence.

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E. B. Gillett, for the plaintiffs.

A. M. Copeland, for the defendants.

Shaw, C. J. The present action is brought to recover a debt for goods sold and delivered. It is conceded that the goods were sold at a credit of six months. This suit was brought after the expiration of the six months, and the defence is, that it is prematurely brought, because, at or about the time the debt became due, the plaintiffs consented to extend the time twelve months. This is denied by the plaintiffs; they insist that, although such proposal was made to them, they never acceded to it. The evidence on which the question arises, whether the plaintiffs did consent to extend the time, resting mainly in correspondence, is submitted to the court upon an agreed statement.

Without expressing any opinion on the question whether the bare, naked assent of a creditor to extend the time for the payment of a debt becoming due, without a new consideration, without the concurrence of other creditors in a like extension for their mutual benefit, is a sufficient consideration for the extension, we are of opinion in this case that no such assent was given. The copies of the letters are not all given; but we can pretty safely judge of the terms of those omitted from the answers to them.

The first letters of the debtors of the 24th and 28th of October stated their embarrassment, their desire to treat all their creditors alike and pay all in full, and their desire, for that purpose, to obtain an extension for twelve months. The plaintiffs' answer, it is said, was mistaken in omitting the word "not." We do not consider the evidence offered competent to prove this mistake, and thus reverse the meaning of the sentence; but taking the letter of the plaintiffs of the 30th of October 1857 as it stands, it does not amount to an agreement to the debtor's proposition. After expressing a general approval of the purpose of the debtors to pay and secure their indebtedness at a stated time, they add: "But so small an amount as ours we should feel willing to extend twelve months." It is certainly equivocal. Beginning with the word "but" indicates a purpose

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not fully to accede. Again; "we should feel willing," not "we are willing." This form of language implies some condition, some contingency, upon which this willingness would exist. The debtors might at the moment have so understood it; but it is manifest, from the succeeding correspondence, that they did not intend so to be understood; and the debtors, in the subsequent letters, clearly indicate, we think, that they did not consider that the plaintiffs intended to express their unqualified assent to the proposed extension, and intimated that whatever should be done in that direction should be by the concurrent action of the creditors. And further; in the above cited passage, which is relied upon as an unconditional agreement to an extension of twelve months, the plaintiff further added: "If you have many creditors here, [in Boston,] there ought to be a concert of action between you and them."

Taking the whole together, suppose it is not proved that the word "not" was accidentally omitted before "willing," it seems to us that the sentence, if not imperfect, is equivocal; it can only be construed to be a consent to extend the credit on the condition that the same should be done by a concert of action with all the large creditors, which was never effected.

Judgment for the plaintiffs.

INHABITANTS OF AMHERST *vs.* INHABITANTS OF SHELBURNE.

A vote of a town between 1767 and 1789, by which J. S. and others were "constituted" one of the school districts of the town, is no evidence of such approbation of the town of his dwelling there, as was required by the Prov. St. of 7 G. 3, c. 3, to give him a settlement in the town.

Legitimate children cannot derive a settlement from their mother, without proving that their father had no settlement within the Commonwealth.

ACTION OF CONTRACT to recover the expenses of supporting Norman Smith, a lunatic pauper, at the State Lunatic Hospital in Worcester. Trial in the court of common pleas in Hamp-

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shire at February term 1859, before *Morris*, J., who signed a bill of exceptions, the material part of which was as follows :

" Norman was born in Whitingham, Vermont, on the 14th of June 1814, and was the son of Elijah Smith, and grandson of Asa Smith and Submit Smith his wife, who moved to Whitingham from Shelburne in April 1796. Asa Smith was born in Belchertown, and went to Shelburne when he was about twenty.

" It appeared by the records of the town of Shelburne, that at a town meeting held on the 12th of May 1783, under a proper article in the warrant, Asa Smith with seventeen other persons named were by vote of the town constituted the northwest school district, pursuant to the report of a committee of the town.

" The plaintiffs contended that by virtue of this vote he gained a settlement in Shelburne, and that if he did not thus gain a settlement there, he had a settlement in Shelburne, derived from Submit Smith, his grandmother; there being no other evidence tending to show that Asa Smith gained a settlement in this commonwealth, and Elijah Smith not having gained a settlement here till after Norman became of age.

" But the court ruled that Asa did not gain a settlement in Shelburne by being a member of the school district as aforesaid; and that the plaintiffs must prove that Asa Smith had no settlement in this commonwealth, before they could establish a derivative settlement for the pauper through Submit Smith.

" The jury returned a verdict for the defendants. To the foregoing rulings and instructions the plaintiffs except."

R. A. Chapman & E. Dickinson, for the plaintiffs.

G. T. Davis & C. Allen, for the defendants.

METCALF, J. The vote of the town of Shelburne, in May 1783, by which Asa Smith and others were " constituted the northwest school district," did not confer on him a settlement in that town. There never was any law in Massachusetts, by which a settlement could be acquired in that way. If he first went to reside in Shelburne after the 10th of April 1767, (which the exceptions do not show,) the only way in which he could

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gain a settlement there, until after the passage of *St.* 1789, *c.* 14, was by making his desire known to the selectmen, and obtaining the approbation of the town, at a general meeting of the inhabitants, for his dwelling there. *St.* 7 G. 3, *c.* 3, Anc. Chart. 663, 664. Leavitt's Summary, 17–27. If, before the 10th of April 1767, he went to reside there, and gained a settlement in any of the ways then prescribed or recognized by law, that fact should have been shown at the trial.

The words of the *St.* of 7 G. 3 are very explicit, "that no person shall gain an inhabitancy" in any town by any length of residence there without warning, unless he "shall first have made known his desire to the selectmen thereof, and obtained the approbation of the town at a general meeting of the inhabitants for his dwelling there; nor shall any town be obliged to be at charge for the relief and support of any person residing in such town, that has not been approved as aforesaid."

In *Orange* v. *Sudbury*, 10 Pick. 22, it was decided that the approbation, by a town, of a man as juror, was not such an approbation of his dwelling in the town, as was required by said *St.* 7 G. 3, in order to confer a settlement on him; an implied assent of the town not being sufficient for that purpose. In the present case, there was not even an implied approbation by the town of Shelburne of Asa Smith's dwelling there. He was an inhabitant of the town, and by law entitled to the privileges of the town schools, though he had no settlement in that or any other town; and upon the formation of school districts, he would, of course, be included in some one of them. And this is also an answer to a suggestion made in the argument for the plaintiffs, that Asa Smith and others being constituted a school district was evidence from which it might legally be inferred that he had previously gained a settlement. That point, however, was not made at the trial, and is not now open to the plaintiffs. But if it were open, it would not avail them.

The plaintiffs waived their exception to the ruling, that they must prove that Asa Smith, the pauper's grandfather, had no settlement in the Commonwealth, before they could establish a derivative settlement of the pauper through Submit Smith, his

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mother. By the English common law, legitimate children derive their settlement from their father, if he have a settlement in England, and if he have none in England, then from their mother, if she have one there. *Rex* v. *St. Botolph's*, Bur. Set. Cas. (2d ed.) 367, and Sayer, 200. *Rex* v. *St. Matthew*, Bur. Set. Cas. 482. So by our statutes, which adopted the pre-existing rule of the common law, in this particular, such children follow and have the settlement of their father, if he have any within this commonwealth; but if he shall have none, they shall follow and have the settlement of their mother, if she have any. And that the ruling above stated was right, and the exception thereto properly waived, see *Wilmington* v. *Burlington*, 4 Pick. 174; *Randolph* v. *Easton*, 23 Pick. 245, 246; *Barnstead* v. *Alton*, 32 N H. 245. *Exceptions overruled*

GEORGE A. RICHARDS *vs.* INHABITANTS OF ENFIELD.

A traveller upon a highway, who stops and ties his horse outside of the limits of the highway, using due care, cannot, if the horse gets loose and runs upon the highway, and suffers an injury from a defect therein, maintain an action against the town for such injury.

ACTION OF TORT for injuries sustained by the plaintiff's horse from a defect in a highway in Enfield, which the town was bound to keep in repair. Trial and verdict for the plaintiff in the court of common pleas in Hampshire at February term 1859 before *Morris*, J., who signed this bill of exceptions:

"The evidence tended to show that the plaintiff, with said horse and in a wagon, shortly before the accident, had travelled from the north towards the south, over a portion of this highway, and that he stopped at the house of one Morton for the purpose of obtaining some corn; that he tied said horse to a post, and it was conceded at the trial that the place where both horse and wagon were standing when said horse was so tied was entirely outside of the external limits of said highway; that

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while the plaintiff was in said Morton's house, putting up the corn, said horse became detached from the post (but how no one saw) and turning completely around, regained said highway, and with said wagon ran homeward on the same road by which said plaintiff had come to said Morton's.

"The plaintiff's evidence tended to show that said horse ran a distance of some twenty rods, and went down an embankment on the easterly side of said highway, and there suffered the injury complained of. And the plaintiff contended that the town's negligence consisted in not providing, on the easterly side of the wrought part of said highway, a suitable railing.

"The defendants asked the court to rule that they were not liable for an injury accruing after the plaintiff had left his horse tied outside of the limits of said highway. But the court, for the purposes of the trial, ruled otherwise, and the defendants excepted.

"The court gave the usual instructions (not objected to by the defendants) as to the necessary care to be used by the plaintiff in the care, management and tying of his horse; also as to what would be a defect in the road for which the town would be responsible; and that the defect must have been the sole cause of the accident."

C. Delano, for the defendants.

R. A. Chapman, for the plaintiff. The jury, under instructions, to which no exception is taken, have found that the plaintiff used proper care in the management and tying of his horse, and that a defect in the road, for which the town was responsible, was the sole cause of the accident. The defendants are therefore liable, although the plaintiff had lost the control of his horse, and lost it outside of the limits of the highway. *Tallahassee* v. *Fortune*, 3 Florida, 19. *Palmer* v. *Andover*, 2 Cush. 600. *Goldthwait* v. *East Bridgewater*, 5 Gray, 61. *Tuttle* v. *Holyoke*, 6 Gray, 447. *Kelsey* v. *Glover*, 17 Verm. 708. Angell on Highways, § 343. *The King* v. *Russell*, 6 East, 427. *Rex* v. *Cross*, 3 Campb. 225.

It is incident to the customary and prudent use of highways by travellers thereon, to hitch their horses temporarily, just out-

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side of the highway, while stopping at a neighbor's house, a shop, an inn or a mill; and if the horse becomes frightened, and breaks away, without fault of the driver, he is properly upon the highway. To hold that no recovery can be had for an injury suffered from a defect in the highway by a horse who has been tied outside of its limits, would oblige travellers to tie their horses within the limits of the highway, a much less safe and convenient practice; and would prevent a traveller on a highway, near the boundary between two towns, from maintaining any action for an injury to a horse of which he lost control in one town, and which suffered the injury from a defect in the highway in the other; for in such case the first town would not be liable, because the defect was not in a highway which it was bound to keep in repair; nor the second town, because the plaintiff lost control of his horse before he came upon its highway.

Bigelow, J. The injury to the plaintiff's horse was the result of causes which happened outside of the limits of the highway, as well as of causes which happened within it. Both contributed to the accident. The case is therefore within the recent decision in *Rowell* v. *Lowell*, 7 Gray, 100, which determines that a city or town is not liable to an action for damages for injuries sustained on the highway, unless the accident is occasioned by causes which occurred entirely within the highway.

There is another decisive objection to the right of the plaintiff to recover in this action. The duty imposed on towns in respect to the repair of highways is, that they should keep them "safe and convenient for travellers, with their horses, teams and carriages." Rev. Sts. *c.* 25, § 1. The liability of towns for defects or want of repair in highways is intended to be commensurate with this duty. It is only those who are using the road for legitimate purposes, in the usual and ordinary mode, that can claim indemnity of a town for injuries caused solely by defects in the highway, or by the combined effect of such defects and pure accident. Beyond this the legal liability of towns does not extend. In the present case, the plaintiff was not travelling on the road at the time of the accident. He had driven his horse

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out of the highway and there tied him. His use of the road for the time being had ceased as entirely as if he had taken his horse out of the vehicle, and placed him in a stable, or turned him into a pasture. As it is clear that towns cannot be held responsible for damages happening to animals unlawfully at large, or who escape into the highway, without drivers, through carelessness or accident, it follows, that on the facts proved in this case the plaintiff cannot maintain his action.

Exceptions sustained.

JAMES L. SIKES *vs.* INHABITANTS OF HATFIELD.

A surveyor of highways cannot recover compensation of the town for his official services.

Where a highway tax is raised to be expended in labor and materials, a surveyor of highways cannot charge the town for work performed by himself, at his own discretion, beyond the amount of his own tax bill.

Votes of a town to raise a certain sum of money for the repairs of highways, and that the same be a labor tax, and "to pay the surveyors one shilling per hour, teams one shilling per hour, and hands fifteen cents per hour," are no evidence of a contract by the town to pay a surveyor for work voluntarily performed by himself upon the highways, beyond the appropriation; even if the town has paid for such services in past years.

ACTION OF CONTRACT by a surveyor of highways in Hatfield for 1856 to recover of the town compensation for work done upon the highways in the district assigned to him by the assessors, beyond the amount of his own highway tax for the year, and in addition to the whole amount of the tax list committed to him.

At the trial in the court of common pleas in Hampshire at June term 1859, the plaintiff offered in evidence an auditor's report, which found the following facts: The town of Hatfield passed these votes at their respective dates:

"1855. April 16th. Voted, to raise the sum of five hundred dollars for highways, and that the same be a labor tax. Voted, To pay the surveyors one shilling per hour, teams one shilling per hour and hands fifteen cents per hour. Voted, That the surveyors be collectors of their tax bills.

"1856. April 7th. Voted, That the money raised for the

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repairs of highways the ensuing year be a labor tax, and that the same price for labor per hour be paid surveyors, hands and teams as was paid last year. Voted, That the surveyors be collectors of their rate bills. Voted, To raise the sum of five hundred dollars for highways the year ensuing."

The town also appropriated four hundred and fifty dollars for contingent expenses in 1856. On the 7th of April 1856, the plaintiff was chosen surveyor of highways in a district in which he did not reside, and duly sworn. After his election, in April and May 1856, he did work upon the highways in the district assigned to him, to the amount of $9.58.

The list of persons taxed, with the amount of their taxes ($158.66) and the warrant for collection, signed by the assessors, bearing date of the 7th of June 1856, were delivered to the plaintiff on the 9th of June; and the plaintiff caused the whole amount of taxes, thus committed to him, to be expended in the repairs of the highways within his district, either in labor by the taxpayers, or, where they paid in money, in labor for which the money was appropriated, exclusively of his charge for superintendence of such repairs, ($39.69,) and for his personal services on said highways, ($13.93,) all of which was faithfully bestowed upon the improvement of the highways, and for which he received no compensation. The plaintiff's own highway tax was thirty six cents. The plaintiff, by agreement with some of the taxpayers, worked out their taxes for them; charging some of them only twelve and a half cents an hour, while the town allowed in the tax bills fifteen cents an hour.

Some time after all the services were performed, the plaintiff presented a bill to the town, and requested payment. The selectmen objected to the amount of the bill, and brought it before the town. The town referred the subject to a committee, who, after consideration, reported in favor of paying the plaintiff twenty five dollars, provided he would accept that sum, and give a receipt in full of his claim, which he refused to do, and commenced this action.

In years previous to 1856 surveyors of highways in Hatfield had been in the habit of doing work beyond the amount of

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their tax bills, and being paid therefor by an order of the selectmen upon the town treasurer. There was an understanding that a surveyor might do himself, or cause to be done by others, work to the amount of ten dollars, beyond the amount of their tax bills, without authority from the selectmen; but that if such work exceeded that amount, they must have the previous verbal approbation of one or more of the selectmen. Several instances of such work in years previously to 1856, to a larger amount than ten dollars, done by the surveyor himself and by others employed by him, were proved to have been presented to the selectmen and paid for by orders on the town treasurer; and the plaintiff relied upon this usage to sustain his claim.

The auditor disallowed the item of $9.58 for services performed by the plaintiff before he received his tax list, and of $13.93 for his personal services afterwards, and allowed the charge of $39.69 for superintending the work of others. The parties agreed that all objections to evidence should be open on the auditor's report.

Briggs, J., "*pro forma*, and for the purpose of saving all questions upon the auditor's report, instructed the jury that upon the facts and evidence reported by the auditor they might render a verdict for the plaintiff for the full amount claimed." The jury returned a verdict accordingly, and the defendants alleged exceptions.

S. T. Spaulding, for the defendants.

W. Allen, Jr. for the plaintiff. The general duties required by law of a highway surveyor, when the tax is a labor tax are, 1st. To collect the tax in labor and materials, and if any payment is offered in money, to receive it and expend it in repairing the ways; 2d. If there is a deficiency in the amount received from the tax, to supply it by procuring labor and materials on the credit of the town, in the manner pointed out by statute; 3d. To determine what particular repairs shall be made, and to make the same with the labor and materials furnished by the tax, or procured on the credit of the town. *St.* 5 W. & M. (1693), Anc. Chart. 267. *St.* 1786, *c.* 81. Rev. Sts. *c.* 25,

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§§ 1, 3, 11–14, 21, 22, 24; *c.* 15, §§ 82–84. *Loker* v. *Brookline*, 13 Pick. 343. *Armstrong* v. *Wendell*, 9 Met. 522. *Callender* v. *Marsh*, 1 Pick. 418. *Wood* v. *Waterville*, 5 Mass. 294.

These services are for the town, and the surveyor, like other town officers, is entitled to a reasonable compensation from the town, without any statute or any vote expressly giving it. Rev. Sts. *c.* 15, §§ 36, 65; *c.* 23, § 42. *White* v. *Phillipston*, 10 Met. 108. *Emerson* v. *Newbury*, 13 Pick. 377. A labor highway tax is not a fund appropriated to the payment of the surveyor's compensation, and he must look to the town. *St.* 5 W. & M. Anc. Chart. 267. *Sts.* 1786, *c.* 81; 1796, *c.* 58, § 5. Rev. Sts. *c.* 15, §§ 8, 11, 17, 18. *Jones* v. *Lancaster*, 4 Pick. 149. *Loker* v. *Brookline*, 13 Pick. 343.

The vote of the town, unexplained, is a promise to pay in money for services as surveyor, and renders the town liable for services required of the plaintiff by law, even if, without the vote, an action could not be maintained. If the vote is doubtful, the acts of the town and its agents, under the vote, are competent to show that a payment of money by the town was intended.

The right of the plaintiff to recover for services not required of him by virtue of his office rests on the contract proved by the vote, construed by the usage and acts of the town, which are competent to show for what labor payment was promised. The vote, unexplained, would be construed to refer to the legal services of surveyors; but the language is so general, that the circumstances under which the contract was made, and the acts of the parties under it, are competent to show that it was intended to include also services not required by law, but for which the town had power to contract. *Dudley* v. *Weston*, 1 Met. 477. *Barry* v. *Bennett*, 7 Met. 354. *Knight* v. *New England Worsted Co.* 2 Cush. 271. *Herring* v. *Boston Iron Co.* 1 Gray, 134. *Sargent* v. *Adams*, 3 Gray, 72. *Gerrish* v. *Towne*, 3 Gray, 82. *Old Colony Railroad* v. *Evans*, 6 Gray, 25. *Howlett* v. *Holland*, 6 Gray, 418.

The town had authority to contract with its surveyors to make, personally, repairs on highways. *Sts.* 1786, *c.* 81, § 8

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1796, *c.* 58, § 5. Rev. Sts. *c.* 15, §§ 11, 12; *c.* 25, §§ 1, 8, 9, 11–15. *Spaulding* v. *Lowell*, 23 Pick. 71. *Cushing* v. *Stoughton*, 6 Cush. 389. *Emerson* v. *Newbury*, 13 Pick. 377. *Wood* v. *Waterville*, 5 Mass. 294.

The evidence was sufficient to authorize the jury to find that all the services performed by the plaintiff were intended by the vote.

Hoar, J. It is no part of our duty, and therefore we have no occasion or authority to consider, whether, under all the circumstances, it would be well or honorable for the town to refuse to make any payment for these services, if they have been rendered in good faith, and have been substantially beneficial. The case comes before us to be decided as one of strict legal right, and must be determined upon principles of general application.

It involves two principal questions: First, whether the services rendered created a legal liability in the town to pay for them, independent of any specific contract; and secondly, whether there is any evidence sufficient to authorize a jury to find that the town have made a valid contract with the plaintiff, express or implied, upon which it can be charged.

The court are of opinion that there is no such relation between a town and the officers which it is required by law to elect, as will oblige it to make compensation to them for the discharge of ordinary official duties, where no provision for any compensation is made by law, and in the absence of any contract. Before the recent statute, selectmen received no compensation, although their duties were often burdensome and their services valuable. Until express provision was made by law, the same was true of the members of school committees. Aldermen and common councilmen in the cities are not usually paid, nor overseers of the poor in the towns. A suit against the town, for the reasonable value of the time and labor bestowed upon the public service by such an officer for six years preceding the date of the writ, would probably occasion some astonishment to his townsmen who had elected him. There are usually found in all our towns citizens enough who are competent to fill

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these offices properly, who are willing to discharge their duties gratuitously, influenced by motives of public spirit, or by the honor or incidental advantages attached to the position. In some cases, the law provides that a citizen shall not be required to accept the office so frequently as to make his share of the common duty unreasonable.

The office of surveyor of highways is one which generally is quite extensively distributed, by having a considerable number of districts, in such towns as do not make the care of the highways the subject of special contract. It is an office which, according to the usual practice, affords some compensating advantages to its possessor, and is not unfrequently an object of competition. The surveyor has the opportunity to work out his own tax, where the tax is to be expended in labor, at such time as he may himself determine; and may expend, according to his best judgment, the portions of the tax which may be paid to him in money. He usually finds opportunity to employ some labor profitably in working out the taxes of his neighbors who may employ him for that purpose. But above all, he is enabled to secure at least a reasonable degree of attention to such parts of the public ways as more especially affect his personal convenience. But from whatever motives he may take the office, it is not an office to which, by law or usage, any compensation is attached, unless the town choose to contract for it.

Having no right to personal compensation for his ordinary services, can he then charge the town for labor performed by himself, because the money appropriated to his district is not sufficient to put the roads in a proper condition? We think the statutes relating to the subject clearly exclude such an inference. The town, in the first place, is to determine what sum of money shall be expended upon the roads. If, before this can be made available, or after it is exhausted, an exigency occurs, the surveyor can contract, on the credit of the town, for necessary labor and materials, to an amount not exceeding ten dollars. If a larger amount is requisite, he must obtain the written consent of the selectmen, and, with this, may contract to any extent which may be needed. Rev. Sts. *c.* 25, §§ 8–14. But in mak-

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ing such a contract he acts as the agent of the town, and of course cannot contract with himself. It is one of the elementary principles of the law of agency, that an agent to procure supplies cannot, without the most distinct authority from his principal, furnish those supplies himself. It is inconsistent with the whole nature of his functions that he should do so. The auditor therefore rightly disallowed the charge of $9.38 for work done by the surveyor before he received his tax list. It is undoubtedly not uncommon for a surveyor to do small repairs upon the roads, when it is more convenient to him than it would be to employ others, and for a town to allow and pay his charge without question. But there are many things in the management of town affairs, which are done without objection, and pass by general consent, which cannot, when objection is made, and they are brought to the test of judicial investigation, be supported as strictly legal.

The question remains, whether the evidence stated in the bill of exceptions is sufficient to prove a contract by the town to pay the surveyor anything for his services, beyond the amount of his tax list; and we think it manifestly insufficient. The vote of the town relied on does nothing more than fix, as the town is authorized by law to do, the rate of compensation for each man, team and surveyor, by the hour, in working out the amount of the tax list. There is nothing in it to show that the town contemplated the expenditure of any sum beyond that which they had appropriated and raised by tax for the support and repair of the roads. The fact that the town had in some instances consented to pay surveyors for work done under similar circumstances, and where the surveyors had therefore no legal claim upon them, cannot be considered as evidence of a contract with this plaintiff. The town have offered to pay him $25, which he has declined. But this is no proof that they owe him anything. *Exceptions sustained.*

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Henry A. Beecher *vs.* Edward E. Denniston.

In trover for a manufactured article, which the defendant has declined to exhibit on the trial, a witness who testifies that he is not acquainted with the market value of the article, but that he could form an opinion of the workmanship if he could see it, may be asked by the plaintiff his opinion of the value of the article, as described by other witnesses.

In trover for a chattel, the defendant concealed the chattel until a late stage of the trial, and contended that this created no presumption of its value against him, if he produced it at the trial. The court instructed the jury that the plaintiff ought not to be prejudiced by an intentional withholding of the chattel, calculated and intended to prevent him from showing its actual value as the measure of damages; and that they ought to give the full value, no more and no less. *Held*, that the defendant had no ground of exception.

Action of tort for the conversion of a doublebarrelled gun, a pair of pistols, and a gold watch and chain. Trial in the court of common pleas in Hampshire at June term 1859, before *Briggs*, J., who, after a verdict for the plaintiff, signed a bill of exceptions, the material parts of which are stated in the opinion.

S. T. Spaulding, for the defendant.

C. Delano, for the plaintiff.

Shaw, C. J. Several questions seem to have been raised in the course of this trial, as if they would have an important bearing upon the result of the case; but they were ultimately waived and variously disposed of, so that nothing remained for the jury to decide, but the single question of damages. The action is tort, in the nature of trover, for a doublebarrelled gun, two pistols, a gold watch and chain. In this form of action, there is a fixed rule of damages, which is the value of the property at the time of the conversion, with interest from that time to the time of the assessment.

After it became manifest that it was the purpose of the defendant to conceal the articles, which were of rather a peculiar character, and especially after he had admitted them to be the plaintiff's, so that the detention of them by the defendant was wrongful, it was the right of the plaintiff to have such directions from the judge, as would prevent the defendant from profiting by his own wrong, in getting the property undervalued.

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The defendant, before he had produced the gun, and whilst the plaintiff was getting evidence from persons skilled in the manufacture of guns, according to the best description he could obtain, without the production of the instrument in question, objected to the testimony of McFarland, because he stated that he was not acquainted with the market value of fowling pieces, especially those of English manufacture; but he at the same time stated that he could form an opinion of the workmanship of a fowling piece, if he should see it. This, we think, was admissible. He was a judge of the completeness of the workmanship, the finish and the cost of such work. This was an important element in the inquiry, as the case then stood. After the gun was produced, he was again examined; no exception was taken, nor, in our opinion, could have been taken to his testimony.

One other exception was taken to a direction of the judge in regard to the watch and chain. There being evidence tending to show that these had been studiously concealed to a late stage in the trial, when the defendant produced them, the plaintiff moved the court to instruct the jury that if the watch and chain had been concealed, so as to prevent the plaintiff from having reasonable time to have them examined, the jury were authorized to presume that the property withheld was of greater value than that indicated by the defendant's evidence. This was opposed by the defendant, who insisted that he was under no obligation to exhibit the articles, and that there was no presumption against him, if they were produced at the trial.

The court did not adopt either of these views, in their full extent; but instructed the jury that the plaintiff ought not to be prejudiced by an intentional withholding of the articles, calculated and intended to prevent him from showing their true value, that the actual and true value was the measure of damages, and they ought to give the full value, no more, and no less. This instruction, we think, was strictly correct in point of law, carefully guarded, well adapted to the state of the evidence, and sufficiently favorable to the defendant.

Exceptions overruled.

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Noah Gilman *vs.* William Dwight.

An agreement by the physician of a country village, transferring his practice and good will to another physician for a certain sum, and guarantieing "that no other physician, for the space of four years, will establish himself in this place as a competitor, unless the increased population of the place should warrant it, or unless the purchaser should commit some act, which shall forfeit to him the confidence of the community," and agreeing, in case any such competitor shall establish himself there within that time, contrary to the above provisions, to repay the sum paid, is not void as being in restraint of trade, nor too uncertain and insensible to support an action.

Action of contract upon this agreement: "South Deerfield, March 30th 1853. This is to certify that I, William Dwight, M. D., of South Deerfield, in consideration of two hundred dollars paid to me by Noah Gilman, M. D., of Boston, hereby transfer to the said Gilman my professional business in this place and the good will of my patrons; obligating myself to relinquish entirely from this date the practice of medicine in this region, and do all in my power to introduce said Gilman into business, and to induce my employers to sustain him.

"I do assure the said Gilman also that for the space of several years past I have, with few exceptions, done the medical business of this town. I also guaranty to the said Gilman that no other physician, for the space of four years, will establish himself in this place as a competitor, unless the increased population of the place should warrant it, or unless said Gilman should commit some act which shall forfeit to him the confidence of the community; and in case such competitor shall, within the above specified time, locate himself in South Deerfield, contrary to the above provisions, I agree to refund to said Gilman the money paid by him to me as bonus, and interest on the same. William Dwight."

The declaration alleged that the plaintiff, relying on this agreement, "established himself in business as a physician in South Deerfield, and continued there as such physician for the space of five years, during which time he committed no act to forfeit the confidence of the community, and did not forfeit such confidence by any act by him committed, and the increase of

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population in South Deerfield did not warrant that another physician should establish himself in such place as a competitor of the plaintiff within the four years mentioned in said agreement."

The declaration then alleged that certain other physicians did, within said period of four years, establish themselves in South Deerfield, and practice there as physicians and as competitors of the plaintiff, to the damage of the plaintiff to the amount mentioned in said agreement, and thereby the plaintiff was injured in his business and prevented in, and deprived of, the care and treatment of patients which would otherwise have been entrusted to him. "And the plaintiff claims a sum of two hundred dollars and interest, to be repaid according to said agreement as such damages; and the defendant owes the same to the plaintiff."

Answer, that the stipulation, for breach of which this action was brought, was illegal and void; and that if another physician established himself in South Deerfield within the four years mentioned in the agreement, "it was because the plaintiff, by his acts, conduct and method of practice as a physician, and by his acts, conduct and offensive deportment as a citizen of the community on which said plaintiff was dependent for patronage and business, forfeited the confidence of the community, and the people composing said community thereby became alienated from said plaintiff, and employed other physicians"

At the trial in the court of common pleas in Hampshire at June term 1859, upon the reading of the declaration, *Briggs*, J., at the request of the defendant, ruled that the agreement was void, and that no action could be maintained for a breach of it. The plaintiff alleged exceptions.

S. T. Spaulding, for the plaintiff.

G. T. Davis & C. Delano, for the defendant. The stipulation, "that no other physician for the space of four years will establish himself in this place as a competitor, unless the increased population should warrant it, or unless said Gilman shall commit some act which shall forfeit to him the confidence of the community," cannot be enforced in law. The law will not assist one party to an illegal contract, to recover back money from the other party. *McKee* v. *Manice*, 11 Cush. 358

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This stipulation is not confined to the defendant's own personal competition, but is an agreement to exclude all other physicians from the place in question. It is therefore unreasonably in restraint of trade, tending to create a monopoly, and prejudicial to the public health; besides being beyond the defendant's power to perform. *Davis* v. *Mason*, 5 T. R. 120. *Nerot* v. *Wallace*, 3 T. R. 22, 23. *Alger* v. *Thacher*, 19 Pick. 51. Smith on Con. 125–130, and cases cited in notes.

The conditions upon which a breach is predicated are too indefinite, uncertain and insensible. South Deerfield has no corporate limits. What must be the population to justify competition? What the nature of the act which is to forfeit the confidence of the community? How extensive is the "community" whose confidence is to be forfeited? Is it the confidence of South Deerfield merely, or of the "region" within which defendant relinquishes his practice? And how can such confidence be forfeited "to him"?

Bigelow, J. The agreement on which the plaintiff relies is not open to the objection that it is invalid as being in restraint of trade. Tried by the tests which are usually applied to ascertain the validity of such agreements, it will be found to contain the essential requisites of a binding contract.

In the first place, it is only in partial restraint of trade. The defendant did not agree to relinquish entirely the practice of his profession, but only to discontinue it in the place where he had previously resided. Nor did he agree that no other physician should practice in the village or its vicinity for four years, but only that if a competitor with the plaintiff should establish himself there, he would repay to the plaintiff the sum which he had paid as the price or bonus for the good will and patronage which the defendant sold and undertook to guaranty to the plaintiff. This was nothing more than an agreement to repay to the plaintiff the sum paid by him to the defendant as upon a failure of consideration, in the event that the benefit of the contract should be lost to the plaintiff by competition in the practice of his profession.

In the second place, the contract was upon an adequate, and

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not merely a colorable consideration. And lastly, it was reasonable, that is, the restraint stipulated for was only such as to afford a fair protection to the party in whose favor it was made, and was not so large as to interfere with the interests of the public. *Hitchcock* v. *Coker*, 6 Ad. & El. 438, and 1 Nev. & P. 796. *Mallan* v. *May*, 11 M. & W. 653. *Elves* v. *Crofts*, 10 C. B. 241. *Turner* v. *Evans*, 2 El. & Bl. 511.

There is nothing in the nature of the business or profession to which the contract relates, which takes it out of the ordinary rules applicable to contracts in partial restraint of trade. The cases are numerous in the books, in which similar contracts entered into by attorneys, solicitors, apothecaries, dentists and surgeons have been upheld and enforced. *Whittaker* v. *Howe*, 3 Beav. 383. *Horner* v. *Graves*, 7 Bing. 735, and 5 Moore & Payne, 768. *Hayward* v. *Young*, 2 Chit. R. 407. *Davis* v. *Mason*, 5 T. R. 118. *Atkyns* v. *Kinnier*, 4 Exch. 776. *Nicholls* v. *Stretton*, 10 Ad. & El. N. R. 346. *Sainter* v. *Ferguson*, 7 C. B. 716.

Nor can we say that the terms of the agreement are so indefinite, uncertain and insensible on their face, that a court of law will not attempt to enforce them. We think a jury, aided by a reasonable construction of the contract, will be able to pass on all the questions which may arise in determining whether the defendant is liable for a breach of his stipulations. It would be quite easy and entirely competent to show what was usually known and called as the village of South Deerfield. *Mallan* v. *May*, 13 M. & W. 653. The "community," by forfeiting whose confidence the plaintiff was to lose his right to recover against the plaintiff, interpreted according to the subject matter, would probably be held to be the population residing in the village and its vicinity, among which the defendant practised his profession at the time of his contract with the plaintiff. Conduct on the part of the plaintiff, which should lead to a forfeiture of the confidence of the community in him, might reasonably be construed to be incompetency, immorality or acts of such a nature as to induce reasonable persons to forbear employing him in the practice of his profession. These questions,

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however, can be best determined when they shall arise on the testimony at the trial. Without deciding them definitely, we have only indicated the mode in which they would probably be solved, in order to show that the contract is not so uncertain and insensible that it cannot be enforced in a court of law.

Exceptions sustained.

Roswell P. Crafts *vs.* Chester Crafts & others

The report of an auditor, to whom a suit in equity is referred without any special order or agreement as to the effect of his report, is *prima facie* evidence, but not conclusive.

A mortgage described the mortgage debt as "two promissory notes, bearing even date herewith, for the sum of five hundred dollars, one payable in 1852 and the other in 1853, with interest to be paid yearly;" and the notes referred to, being produced and identified, were for five hundred dollars each. *Held*, that the notes were competent evidence to explain the mortgage, as against the mortgagor, or one who purchased the equity of redemption with notice that the mortgage was intended to secure both notes.

One tenant in common, of real estate conveyed to two, paid his half of the purchase money, and joined with his cotenant in a note and mortgage to secure the payment of the other half, and afterwards released his interest in the land to the mortgagee. *Held*, that his cotenant, or one claiming under him with notice of the facts, could not redeem the estate without paying the whole amount of the mortgage.

Two tenants in common of land made a joint mortgage thereof, and one of them afterwards released his interest to the mortgagee, who made improvements upon part of the land with the knowledge of the other mortgagor. On a bill in equity to redeem, by the assignee of the latter, the court ordered that portion to be assigned to him on which no improvements had been made.

Bill in equity to redeem land in Easthampton from a mortgage. At the hearing before *Dewey*, J., the defendants introduced the report of an auditor, to whom the case had been referred at a previous term without any special order of the court or agreement of parties as to the effect of his report. The judge declined to hear evidence offered by the plaintiff to control the auditor's report, and reserved this and all other questions of law arising in the case for the consideration of the full court, who, after argument at this term, held that said report was *prima facie*, but not conclusive evidence.

Another hearing was then had before the same judge, and

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reported to the full court at the ensuing term at Springfield. The conclusions of fact at which the court arrived upon the evidence are stated in their opinion.

S. T. Spaulding, for the plaintiff, cited Broom's Max. (2d ed.) 712 *& seq.;* 1 Greenl. Ev. §§ 297–301; 2 Story on Eq. § 1016 *b*, *& note; Spring* v. *Haines*, 21 Maine, 126; *Borst* v. *Boyd*, 3 Sandf. Ch. 501; *Richmond Trading & Manuf. Co.* v. *Farquar*, 8 Blackf. 89; Rev. Sts. *c.* 59, §§ 28–30; *c.* 74, § 1, *cl.* 4; *c.* 107, §§ 13–16, 18, 19, 29; *Adams* v. *Brown*, 7 Cush. 223; *Wyman* v. *Hooper*, 2 Gray, 141; *Grover* v. *Thatcher*, 4 Gray, 526.

R. A. Chapman & C. Delano, for the defendants, cited Rev. Sts. *c.* 107, § 29; *Clarke* v. *Grant*, 14 Ves. 519; *Wendell* v. *Van Rensselaer*, 1 Johns. Ch. 344; *Storrs* v. *Barker*, 6 Johns. Ch. 166; 1 Story on Eq. §§ 39, 388–391; 2 Story on Eq. §§ 742, 750, 781, 877; Drewry on Injunctions, *c.* 2, § 11; Fonbl. Eq. *c.* 1, § 7.

Dewey, J. The plaintiff in this bill is the undisputed owner of a moiety of an equity of redemption in certain lands mortgaged by Joseph P. Snow and George C. Clapp to the defendants, by their mortgage executed on the 19th of July 1849. This mortgage was made to secure the payment of the sum of one thousand dollars, being one half of the consideration of a conveyance made by the mortgagees to the mortgagors of the same land in fee. Clapp on the 25th of September 1851, by his deed of release and quitclaim, conveyed to the mortgagees all his interest in the premises; and Snow on the 9th of July 1853 released and quitclaimed all his interest in the premises to the plaintiff; and it is through this title that the plaintiff seeks to support this bill. The inquiry is, upon what terms and conditions he may redeem the estate?

The case comes before us upon the report of an auditor, and such additional testimony as was subsequently taken upon the order of the court, and which is to be considered in connection with the report of the auditor, it not being shown by the record that the parties had agreed that the auditor's report should be taken and used as a statement of facts.

1. The first question raised is as to the amount secured by

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this mortgage. Taking the description contained in the mortgage deed alone, it is thus: "Whereas the said Joseph P. Snow and George C. Clapp have made and executed two promissory notes, bearing even date herewith, for the sum of five hundred dollars, one payable in 1852 and the other in 1853, with interest to be paid yearly." It is contended, on the part of the plaintiff, that the entire sum or amount of the two notes is only five hundred dollars, and that the mortgage may be redeemed by paying that sum with the accruing interest.

That such was not the intention of the parties is quite certain, and may, we think, be considered as properly established by the facts shown in the case. The notes referred to are produced, and their identity shown by uncontroverted evidence, including that of Snow, one of the mortgagees. They are for the sum of five hundred dollars each. Snow testifies that he informed the plaintiff, before he purchased his right in equity, that these notes were due and unpaid. The plaintiff admits, in his own testimony, that Snow told him there were two notes of five hundred dollars each included in the mortgage.

The evidence offered upon this point is not incompetent as contradictory to the express language of the mortgage, but is well authorized to render the same more certain; the notes being referred to in the mortgage, and it being fully shown that all parties — Snow in the first instance, and the plaintiff before making his purchase — knew the actual amount of the notes referred to in the mortgage and secured thereby.

2. It was next insisted that the two notes, being signed by the two purchasers and mortgagees, Snow and Clapp, and the defendants having taken a release and quitclaim from Clapp, the plaintiff could only be required to pay one half of the amount of the debt secured by the mortgage, to entitle him to redeem. But this position cannot be maintained, inasmuch as the defendants, having a prior title as mortgagees to hold the premises until the sum secured by the mortgage is paid, may insist upon such prior title, and decline aiding in the redemption, leaving the tenant of a moiety of the redemption to avail himself of his legal rights; and also for the further reason, that

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it is shown in the case that these two notes were wholly for the sole debt of Snow, as between Snow and Clapp. Clapp had paid or secured his part of the purchase money, irrespective of the mortgages, and, as to that, he was the mere surety of Snow. We think that from the evidence in the case it sufficiently appears that the plaintiff was fully apprised of this fact, and must have understood that the notes were given on Snow's account, and for his portion of the purchase money. Such being the case, the plaintiff, holding under Snow, should not be permitted to redeem without paying the entire indebtedness of Snow, secured by the mortgage. The mortgagor, or his assignee, in case there is one, must pay the whole liability charged upon the mortgage, before he will be allowed to redeem, unless he can show that equity requires the other party to abate some portion thereof, by reason of his liability to contribute to the payment of the same.

3. The further question in the case arises upon the peculiar facts of this case, as to the nature of the title of the respective parties, and the large expenditures that have been made by the defendants in erecting buildings and making other improvements upon a portion of the mortgaged premises. The plaintiff asks for a naked decree, permitting him to redeem the mortgage, and to hold his interest in the premises in its present improved state, without contributing to the expenditures therefor. As between mortgagee and mortgagor, the rule undoubtedly is that expenditures only of a very limited character, and those apparently required to preserve the property and continue its productiveness, are to be made by the mortgagee at the cost and charges of the mortgagor. But this case is supposed to differ from ordinary cases, the equity of redemption having been originally held by the plaintiff's grantors, Snow and Clapp, as tenants in common, and the defendants having, before the making of the expenditures, acquired Clapp's interest in the equity of redemption. The defendants had the older and better title as mortgagees of the entire premises, and also the subsequently acquired title of a moiety of the interest held by the mortgagors.

But the defendants more particularly rely upon the circum-

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stances attending these expenditures, as showing the same to have been made with the concurrence of Snow to this extent, that the money to be expended thereon was to be advanced by the defendants, and the remuneration therefor to be obtained out of the proceeds of the sales of the property thus improved, and not to be a personal charge on the mortgagor Snow. Upon the whole evidence before us, we think it sufficiently appears that this was so understood and acted upon by the parties then in interest. Snow was at this time the exclusive owner of the interest in the estate, now claimed by the plaintiff. The defendants had made an entry for the foreclosure of this mortgage on the 23d of September 1851. The plaintiff acquired the title of Snow on the 9th of July 1853, and knew, or had full opportunity to know, as to those expenditures, before he made his purchase; all the houses having been erected on the premises before the date of the conveyance to the plaintiff by Snow. The auditor finds further that upon the evidence before him he was satisfied that Snow communicated to the plaintiff the facts as to the expenditures by the mortgagees, and that Snow had no claim to any benefit from the buildings thus erected by the mortgagees, unless he should choose to contribute his share towards paying for them. The plaintiff therefore has not any greater rights than Snow, in reference to the redemption of this property from the mortgage held by the defendants. The question therefore recurs, Had Snow the right to redeem the premises mortgaged, without contributing his share to the payment of these expenditures, or some limitation which may reasonably secure the defendants for the expenditures made by them? In the opinion of the court, upon the present application to redeem this mortgage, it is proper to impose such condition in granting the same; as equity and justice may require as between these parties.

If the plaintiff had elected to contribute to the payment of the expenditures to the extent of his interest in the lands, that might be a suitable mode to effect this object. But this not being desired by him, and it appearing to the court that a partition of the premises may be made, giving to the plain-

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tiff his moiety in that portion of the lands upon which no buildings have been erected by the defendants, the right to redeem will be made subject to a provision for making such partition, and assigning to the plaintiff his portion of the estate out of such part, and requiring the parties respectively to execute all proper deeds to each other to carry such partition into effect. *Decree accordingly.*

James Caldwell *vs.* Nathaniel Dickinson.

Bonds of submission to arbitration recited that differences had arisen "concerning the matter that C. demands of D. possession of certain tracts of land," (described,) "which C. alleges D. has without law entered upon and disseised C., and still withholds the possession thereof from him; which differences and all demands concerning the same the parties have agreed to refer;" and stipulated that the parties should give deeds according to the award. *Held*, that it appeared with sufficient clearness that the matter submitted was the claim of one party to the possession of certain land withheld from him by the other, and that the difference between the parties concerned the true boundary line of their adjoining lots.

Held, also, that an award "that the north line, so called, between C. and D. shall be the line established by the survey of R., as exhibited by him at the hearing," and described in the award by metes and bounds, courses and distances, was a sufficient determination of the whole matter submitted.

Held, also, that such award was not invalidated by reciting that the submission was between B. and C. of the one part and D. of the other.

Awarding costs, which it is beyond the power of the arbitrators to do, is no ground for refusing specific performance of the residue of the award.

A bill in equity lies to compel the execution of a deed of land, ascertained, by an award of arbitrators agreed upon by the parties to settle the boundary line between their adjoining lands, to belong to the plaintiff.

The parties to a submission bound themselves to perform the award which certain arbitrators should "make and publish in writing under their hands," concerning a boundary line in dispute. The arbitrators executed a paper as an award, and read it to the parties, and signed and delivered copies thereof to them, with an oral statement of the actual decision, and that it was uncertain whether the award expressed it, and that if it did not, it would be afterwards amended so as to conform to their intended decision when the mistakes should be ascertained by an inquiry of the surveyor. The parties then separated, and the chairman of the arbitrators afterwards learned from the surveyor that the line which they had actually agreed on was not correctly stated in the award, and amended accordingly the award which he had retained; but the award was not again presented to the other arbitrators for signature, nor republished. *Held*, that equity would not enforce the specific performance, either of the amended or of the original award

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BILL IN EQUITY for specific performance. The bill alleged that the plaintiff and the defendant on the 2d of December 1857 executed mutual and substantially similar bonds of submission to arbitration in the sum of $200 each; and that the condition of the defendant's bond was this:

"Whereas differences have arisen and are now pending between the above bounden Nathaniel P. Dickinson on the one part, and the said James Caldwell on the other part, concerning the matter that the said James Caldwell demands of the said Nathaniel P. Dickinson possession of certain tracts of land lying in Northfield aforesaid: One tract bounded easterly on the road leading from Sawyer's Mills to Vernon, running west of the Ponds; northerly on the Hunt lands, so called; southerly on land occupied by the said James, and turning westerly as far as said James's land extends; also one other tract of land, cornering on the first described tract, being the easterly part of the Prindle Lot, so called, and in possession of said Nathaniel P., measuring from the fence twenty rods westerly to a stone wall; which the said James alleges the said Dickinson has without law entered upon and disseised the said James, and still withholds the possession thereof from him; and the said Nathaniel P. denies these allegations; which differences, and all demands concerning the same, the said parties have agreed to refer to the award and determination of Josiah D. Canning, Esq., of Gill, and Charles Pomeroy, Esq. and Joseph Young of Northfield, arbitrators indifferently chosen by and between the said parties; the said parties agreeing, and it is understood, that the said arbitrators shall make their award and determination agreeably to the principles of law. Now if the said Nathaniel P. Dickinson, his executors and administrators, on his and their part, shall and do in and by all things well and truly observe, perform and keep the award and determination which the said arbitrators or any two of them shall make and publish of or in the premises in writing under their hands on or before the first day of March next, the said parties to give deeds according to the award of the referees, then this obligation to be void, otherwise to remain in full force and virtue."

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The bill then averred that the arbitrators, after due notice, hearing and consideration, made, agreeably to the principles of law, the following award:

"Know all men by these presents, that whereas differences and disputes have been and are yet depending and unsettled between James Caldwell and William F. Caldwell of the one part, and Nathaniel P. Dickinson of the other part, for the settling and determining whereof the said parties have submitted themselves, and are become bound each to the other by their several obligations, dated the 2d day of December A. D. 1857, in the sum of two hundred dollars, with conditions therein written to obey, observe and abide by and keep the award, determination and judgment of us, Josiah D. Canning, Charles Pomeroy and Joseph Young, arbitrators indifferently chosen by and between the said parties for the purpose of hearing and determining all matters pending between said parties. Now know ye, that we, the above named and undersigned arbitrators, having met the parties aforesaid, and heard their several allegations, proofs, arguments, and having duly considered the same, do award and determine that the 'north line,' so called, between said James Caldwell and Dickinson shall be the line established by the survey of Ozias Roberts, as exhibited by him to the arbitrators, and known at the hearing as the 'Roberts line,' viz.: Beginning at a stake and stones on the west side of the highway leading from Sawyer's Mills to Vernon, by the Pond, and running S. 83¼° W. 129 rods and 5 links to a stake and stones contiguous to an old stone wall; thence on said wall S. 7⅓° W. 15 rods and 9 links to a corner on land of Moses Caldwell; each party to pay and satisfy their own witnesses; and that the costs of this reference, amounting to the sum of twenty eight dollars, be equally shared and paid by the parties aforesaid. Dated at Northfield this sixteenth day of December A. D. 1857."

The bill then averred the plaintiff's offer of a deed, drawn pursuant to the award, to the defendant for execution; and his refusal to execute it, or to convey, release or confirm the premises to the plaintiff, according to the award; and prayed for a

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specific performance of the agreement contained in the defendant's bond; for a conveyance of the land according to the award; or, if the court should be of opinion that the award, by its own force, fixed and established the lines between the lands of the plaintiff and the defendant, or that for any reason it was the more proper remedy for the plaintiff, that the defendant might show cause why he should not bring an action to try his title; and for further relief.

The defendant demurred to the bill, and assigned several causes of demurrer, which are sufficiently stated in his argument, which was made at September term 1858.

G. T. Davis & C. Allen, for the defendant. 1. The bond of submission does not show already what was the matter submitted; whether a question of title, or a claim of damages for trespass, or both. If uncertain, parol evidence is inadmissible. *Furbet* v. *Chamberlain*, 9 Foster, 405.

2. The award simply fixes a boundary line. This was not within the power of the arbitrators; and it does not appear that the boundary line described has any reference to both or either of the lots described, or where the line itself should be, as no starting point is definitely fixed.

3. The line is uncertain without referring to a plan, which is not annexed to the award, and is not a public plan or survey, but a private document, not delivered to the defendant, nor in his control.

4. The award does not exhaust the matter submitted, in not determining whether any trespass was committed, or whether there was any wrongful withholding of possession on the one side or the other, or whether any damages should be paid by either party. It is therefore fatally defective. *Smith* v. *Potter*, 27 Verm. 304. *Houston* v. *Pollard*, 9 Met. 164.

5. The award does not require any deed to be given on either side, nor show any occasion for a deed.

6. The award is expressed to be made upon a submission made by the plaintiff and William T. Caldwell of the one part and the defendant of the other part; whereas the bond set forth submits disputes between the plaintiff alone and the defendant;

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and, in fact, similar disputes between William T. Caldwell and the defendant were submitted to the same arbitrators by another bond.

7. The award exceeds the power of the arbitrators in undertaking to award costs. *Vose* v. *How*, 13 Met. 243. *Peters* v. *Peirce*, 8 Mass. 398. It cannot therefore be enforced by this suit; for equity will not decree specific performance of one portion of an award and reject another portion. See *Nickels* v. *Hancock*, 7 DeGex, Macn. & Gord. 300.

8. If the award itself fixes and establishes the title, the bill should not be sustained; for a deed would add nothing to the legal title; no deed is required by the award; and a real action, or action of trespass, would afford a complete remedy at law in case of dispute between the parties.

D. W. Alvord, for the plaintiff.

The decision was made at Boston in June 1859.

Metcalf, J. This demurrer cannot be sustained for any of the reasons assigned by the defendant. Neither the condition of the arbitration bond, nor the award of the arbitrators, is expressed in exact terms; but both seem to the court to be reasonably certain. The condition of the bond shows, quite intelligibly, that the parties submitted to the determination of arbitrators the differences between them concerning the plaintiff's claim to the possession of certain pieces of land, and the withholding of him by the defendant from the possession thereof. These differences were manifestly concerning the true boundary line of their adjoining lands. And the arbitrators determined and awarded where that line should thereafter be; giving a description of that line by metes and bounds, courses and distances. This being done, the defendant was obliged by his bond to give a deed to the plaintiff of the land on the plaintiff's side of that line, the possession of which land the defendant had withheld from him. But the defendant, though duly requested, has refused to execute a deed to the plaintiff, releasing and quitclaiming that land to him.

The award, in the opinion of the court, decides the matters submitted to the arbitrators, and is final and complete. It is

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not necessary that arbitrators should expressly declare, in an award, that they have decided the matters submitted to them. It is sufficient that this should appear, as it does in the present case, from the contents of the award.

It is clear that this award was made between the parties to the submission, and between them only. The fact was agreed at the argument, that there was a controversy concerning boundary lines of land, not only between the plaintiff and defendant, but also between the defendant and William T. Caldwell, and that these separate controversies were submitted, by separate bonds, to these arbitrators. The recital by the arbitrators, that the plaintiff and William T. Caldwell of the one part, and the defendant of the other part, had submitted their differences, was inaccurate; but it did not affect the validity of the award, which determines the line "between said James Caldwell and Dickinson," and is silent as to the line between William T. Caldwell and the defendant.

We do not inquire whether the award as to costs is valid or not. Admitting it to be invalid, the other parts of the award may nevertheless be sustained. *Maynard* v. *Frederick*, 7 Cush. 252.

The plaintiff, we think, has not a plain, adequate and complete remedy at the common law, for the breach of the condition of the defendant's bond; but is entitled to maintain this bill. *Jones* v. *Boston Mill Corporation*, 4 Pick. 507, and 6 Pick. 148. *Hodges* v. *Saunders*, 17 Pick. 470. *Demurrer overruled.*

The defendant then filed an answer, and a hearing was had at April term 1859 before *Dewey*, J., who made a report thereof for the consideration of the full court, upon which the case was argued at this term by the same counsel, and so much of which as is material to the understanding of the decision is stated in the opinion by

Hoar, J. The plaintiff brings this bill in equity to compel the execution of a deed by the defendant to him, in pursuance of an award of arbitrators, which he alleges was made and published by them in December 1857. The submission of the parties was by an agreement which bound them to abide by

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and perform such award as should be "made and published in writing under the hands" of the arbitrators named in the agreement, on or before March 1st 1858. The question, whether an award has thus been made and published, obviously meets us at the threshold, in our investigation of the case. It is not the province of a court of equity, any more than of a court of law, to make contracts for parties who come before them. Our only duty and power is to enforce by appropriate remedies the contract which the parties have made. The agreement of the defendant to do something, which he has not done, lies at the foundation of the plaintiff's claim.

The case reported shows that the arbitrators met and heard the parties, and agreed upon a decision of their respective rights. A paper, intended as the award, was made, and signed and sealed by the arbitrators; and a copy of it, also signed by the arbitrators, was prepared, and delivered by the arbitrators to the parties respectively. But at the time when the arbitrators met the parties, and read the paper to them, and delivered the copies, it was stated by the chairman that he was uncertain whether the paper expressed correctly what they had in fact decided. Their actual decision was verbally stated by him, with the full concurrence of his associates, and the parties were informed that if the written award did not correctly express this decision, it would afterwards be amended to conform to their intended decision, when the mistake should be ascertained by an inquiry of the surveyor. The parties then separated; the chairman soon after learned from the surveyor that he had not correctly stated in the award the line which the arbitrators had actually agreed on; and he amended the sealed copy which he had retained, so as to make it conform to the decision, as he had told the parties he should do. But the paper, thus altered, was never again presented to the other arbitrators for their signature, nor was any further communication made to the parties respecting it.

It is this altered paper which the plaintiff relies upon in his bill as the award which he seeks to enforce. We can see no just ground for determining that this award was ever made in

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writing under the hands of the arbitrators, and published by them. A paper, different in an essential particular, was published, and the parties were informed that the paper thus published was not certainly the award, but that the real award and decision was something else, which was published to them orally and not in writing, and to which they were told the writing would be made to conform. The objection is plain and decisive. When the real award and decision was published to the parties, it was not in writing. After it was put in writing, it was never published. The foundation of the defendant's agreement to perform an award published in writing was never laid; the condition of it was never performed. The plaintiff, therefore, cannot maintain his suit; because the defendant has made no such agreement as is alleged in the bill. His agreement was not to do whatever the arbitrators might decide, but to do what they should make obligatory upon him by a decision made and promulgated in a manner expressly stipulated.

The plaintiff's counsel has suggested an amendment, by which he might found his claim upon the writing as it was originally made and published. But we cannot see that this would avail him; because it is clearly established that that writing did not contain the real decision of the arbitrators, but was made under a mistake, and was only published to the parties with a proviso that it should not be considered as their award, but should be corrected, if the mistake, which was then suspected, should be afterward ascertained. A court of equity could not enforce, as an award, a paper thus erroneous, and thus issued. *Bill dismissed.*

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JOHN S. CANEDY & others *vs.* WILLIAM G. MARCY.

An heir's deed of his undivided share in certain land of his ancestor, "except the widow's right of dower," passes the reversion in the widow's third of the estate.

Under the *St.* of 1856, *c.* 38, this court has jurisdiction to reform a deed of real estate, upon clear oral evidence that it was not written according to the intention of the parties although the scrivener used the words which he intended.

Lapse of time since the execution of a deed is no objection to having it reformed in equity according to the real intention of the parties making it, if that intention has been acted upon by both parties, and by those claiming under it, until within a year or two.

Under the *St.* of 1856, *c.* 38, this court has jurisdiction in equity to reform a deed made before its passage.

BILL IN EQUITY, under *St.* 1856, *c.* 38, by the eight heirs at law of John Canedy, to reform certain deeds, under which the defendant claimed title to real estate of said John, who died intestate in 1835. Said heirs, in 1836, 1837 and 1845, respectively made deeds of their "undivided eighth parts of the real estate where the deceased last lived, except the widow's right of dower," and their grantee conveyed to one, who in 1848 conveyed to the defendant in fee the tract of land in question, with full covenants of warranty, "except the right of dower to the widow, and my right in the same."

Hearing before *Dewey*, J., who made a report thereof, stating the conveyances in detail, and the residue of which was as follows:

"The complainants alleged and contended that, in all of the above deeds, the reversionary interest of the children, in the land which might be set off to be held by the widow as dower, was intended to be reserved; and that no one of the deeds was meant to convey more than a part or the whole of two undivided third parts of the farm; leaving untouched the widow's dower, and the reversion of the heirs at law.

"It appeared in the case, that the dower of the widow was never legally set out to her; but her enjoyment thereof, to the present time, had been under certain arrangements with the other parties, and under a practical division of the same; the defendant occupying the other two thirds.

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"The case was heard before a jury, upon the request of the defendant, upon the matters in fact in controversy between the parties. After hearing the evidence, it was agreed that the facts shown by the testimony, there being no contradictory evidence, should be reported to the full court.

"It was shown by the evidence, that the oral contract made by the respective parties, in each and all of the conveyances, was a sale of only two thirds of the premises, and did not embrace the reversionary interest of the heirs in the widow's dower land. This was the oral contract; and this was all that the respective parties, at the time of giving and receiving the deeds, understood was to be conveyed. Those who drafted the deeds also so understood the purpose of making the deeds, and intended to carry into effect this oral contract, in drafting the deeds. The evidence also showed that this was the view of his title, as held and acted upon by the defendant from the date of his deed in 1848 until within two or three years past; that he had repeatedly spoken of his title as being only the two thirds, and had applied to the heirs at law to purchase their reversionary interest in the remaining third part. It is not further contended, but that the real bargain was a sale limited to two thirds of the estate.

"It appeared in evidence, upon the inquiry of the counsel of the defendant, put to the draftsman of the deeds, and also to the respective grantors, that the words used in the deeds were the words intended to be used by them, and that in this respect there was no mistake or error; the error being that they supposed the words used would convey only two thirds of the premises, leaving in the heirs at law their rights in reversion to the remaining third held by the widow as her dower. The defendant insists that for this reason this bill should not be maintained.

"It further appeared in evidence that one of the complainants, as agent for the heirs at law, had, previously to the filing of the bill, urged the defendant to correct the error in the deeds, but the defendant absolutely refused so to do. It was proved that the defendant had knowledge, before taking his deed, that

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his grantor claimed, under the deed to him, two thirds of the premises only.

"If, in the opinion of the whole court, this is a proper case for granting the prayer of the complainants, and ordering the defendant to reform his title deeds, or for other suitable relief, the court will so order, or make such other disposition of the case as may be proper."

This case was argued at September term 1858.

W. Griswold, for the defendant, contended that the bill could not be maintained for the following reasons:

1. The deed to the defendant gave him no title in the reversion expectant upon the widow's dower. *White* v. *Crawford*, 10 Mass. 183. *Bridge* v. *Wellington*, 1 Mass. 219. 4 Cruise Dig. tit. 32, *c.* 21, § 65.

2. The mistake, if there was any, was one of law and not of fact. Equity will not relieve against mistakes of law. *Irnham* v. *Child*, 1 Bro. C. C. 92. *Hunt* v. *Rousmanier*, 8 Wheat. 174. *Graves* v. *Boston Marine Ins. Co.* 2 Cranch, 430. *Bank of United States* v. *Daniel*, 12 Pet. 48. *Lyon* v. *Richmond*, 2 Johns. Ch. 51. 1 Story on Eq. §§ 111, 113.

3. The written contracts or deeds cannot be varied by oral evidence. *Irnham* v. *Child*, and *Hunt* v. *Rousmanier*, above cited. *Woollam* v. *Hearn*, 7 Ves. 211. *Higginson* v. *Clowes*, 15 Ves. 516. *Portmore* v. *Morris*, 2 Bro. C. C. 219. *Hare* v. *Shearwood*, 3 Bro. C. C. 168. *Grant* v. *Naylor*, 4 Cranch, 235. *Stackpole* v. *Arnold*, 11 Mass. 27. 1 Story on Eq. § 153. Parol evidence may often be used to resist, where it cannot be used to obtain a decree. *Dwight* v. *Pomeroy*, 17 Mass. 303. 2 Story on Eq. §§ 769, 770.

4. Equity will not relieve against such negligence or want of diligence as this case discloses. It is a case of inexcusable ignorance, and not one of mistake. *Penny* v. *Martin*, 4 Johns. Ch. 566. *Dwight* v. *Pomeroy*, 17 Mass. 303. *Bank of United States* v. *Daniel*, 12 Pet. 57. 1 Story on Eq. § 146.

5. The *St.* of 1856, *c.* 38, cannot apply to mistakes which occurred before its passage.

C Allen, for the plaintiff

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Shaw, C. J. This is a bill in equity, brought under the authority of the late statute extending the equity jurisdiction of this court to all cases of mistake and accident, to reform and correct certain deeds set forth in the pleadings. It comes here upon the report of one of the judges of this court, from which the facts fully appear.

It appears perfectly well proved, if it is competent to prove it for such purpose by parol evidence, and we think it is, that the oral contract was, that the grantor was to convey, and the grantees to take, two thirds of the entire premises of which the intestate died seised, and to except the entire third part of the premises in which the widow particularly had dower, though it had not been assigned to her to hold in severalty; that it was so understood by the conveyancer employed to draw the deeds; that he intended so to draw it, and supposed that he did. But it further appears from his testimony, that he used the words which he intended, but believed the description was such as not to include the reversion in the dower.

It also appears that the defendant, when he obtained his title from his grantor, knew that the grantor claimed the two thirds only, exclusive of the reversion in the dower, and that he considered that to be the extent of his title, and at times made proposals for the purchase of the reversion of some of the heirs, until within a year or two, since which he has denied their right, and refused to correct the mistake.

1. The first question is, whether here was any mistake. Of this we think there can be no doubt, if the intention of the parties was, that this reversion should not pass. The conveyance was of the interests of the heirs in the estate described, except the widow's right of dower. This carried the whole estate subject to the exception. The widow's right of dower was a freehold estate for her own life in one third, and the residue included both the two thirds in possession, and the reversion in the dower. Such was the legal effect of the description adopted.

2. We are therefore satisfied by the evidence that these deeds were made by the mistake of the scrivener, in preparing deeds which excepted only the widow's right of dower, when, under

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the authority given him, and to accomplish his own intention, he should have so drawn the deeds as to except one certain undivided third part of the premises, being that part assigned, or reserved to be assigned to the widow, as her dower.

3. We are aware that a deed is very strong evidence of the intent of the parties, and at law cannot be questioned, but must be taken to be conclusive. But where, in equity, mistake of the parties is expressly charged and put in issue, equity will permit it to be inquired into, and, upon strong and satisfactory proof, to be corrected. The evidence must make it clear. Here we are of opinion that it is proved by such evidence, that the mistake was made and that the deeds did not conform to the oral contract, which they were intended to carry into effect. It is no answer to say that the scrivener used the words which he intended to use. It is the mistake of the parties to the deeds which we are to inquire into; and if they were misled by a misplaced confidence in the skill of the scrivener, it can hardly be said to be a mistake of law and not of fact on their part.

But we are of opinion that courts of equity in such cases are not limited to affording relief only in case of mistake of fact; and that a mistake in the legal effect of a description in a deed, or in the use of technical language, may be relieved against, upon proper proof. *Hunt* v. *Rousmaniere*, 1 Pet. 1. *Gillespie* v. *Moon*, 2 Johns. Ch. 596. *Stedwell* v. *Anderson*, 21 Conn. 139. *Oliver* v. *Mutual Commercial Marine Ins. Co.* 2 Curt. C. C. 299.

There are authorities also, especially the opinion of Chancellor Kent in Johnson's Chancery Cases, that such proof may be made by parol evidence. *Gillespie* v. *Moon*, just cited. Adams on Eq. (Amer. ed.) 168 *note*.

4. The court are of opinion that the defendant be required to execute and deliver to the plaintiffs, their heirs and assigns, a deed of release and quitclaim of all his right, title and interest in the reversion of one undivided third part of the estate, and that he and all persons claiming by, through or under him, be enjoined and prohibited from taking or claiming any right, title or interest in such reversion, against the plaintiffs or any persons claiming by, through or under them. *Decree accordingly*

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Ansel Hemenway *vs.* William O. Bassett.

A purchaser of land gave a note, secured by mortgage thereof, for the purchase money, and entered into possession of the land; and afterwards, by agreement of parties, the note, before payment of any part of it, was given up to be cancelled, and the land was released to the mortgagee. *Held*, that this was no bar to an action of trover by the mortgagee against a purchaser from the mortgagor, with notice, of property attached to the realty.

An agreement in writing, by which a mortgagee agrees to deliver up the mortgage note to be cancelled, upon the doing of certain things by the mortgagor, "which settles all accounts with said mortgagor," may be shown by parol evidence to have been intended as a settlement of all claims for property taken from the premises by the mortgagee.

Action of tort for breaking and entering the plaintiff's close in Hawley, and tearing down and converting to the defendant's own use a sugar house and cistern, and other timber, and manure, attached to the realty.

At the trial in the court of common pleas at November term 1858, before *Briggs*, J., the plaintiff offered evidence tending to show that on the 21st of January 1857 he conveyed said close to Dexter White, and received back from him a note of $1,900, and a mortgage of the same premises, to secure the unpaid purchase money; that White went into possession on the 1st of April following, and continued in occupation until the 24th of April 1858, when, nothing having been paid upon the note, the plaintiff gave up the note to be cancelled, and resumed possession under the following agreement, signed by White, and indorsed on the mortgage: "I hereby give possession of the within described premises to Ansel Hemenway for the purpose of foreclosing the within mortgage; and also, for my heirs and executors, do relinquish my right to redeem the same;" and at the same time, and as part of the same transaction, the plaintiff gave White this writing: "The undersigned hereby agrees to deliver to Dexter White, of Hawley, a note signed by said Dexter White, of the amount of nineteen hundred dollars, dated Plainfield, January 21st 1857; provided that said White shall vacate the premises I sold said White, and also deliver to me a lease that he gave of said premises to C. S Longley, with a

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discharge of the same. I further agree that I will deliver the same upon demand made by White at the house of Chillingsworth F. Crosby, in Charlemont. Which settles all accounts with said White. Ansel Hemenway."

The plaintiff also offered evidence tending to show that before White gave up possession of the premises, and before breach of condition of the mortgage, White, without the knowledge or consent of the plaintiff, and for the purpose, as the defendant knew, of getting as much as he could off the place, for his own personal gain, transferred and delivered to the defendant the property alleged to have been converted by him.

The defendant offered to show that, at the settlement on the 24th of April 1858, the claims sought to be enforced in this action were urged by the plaintiff, and he was distinctly told that no settlement would be made which did not include these claims; that the plaintiff had no book accounts against White, nor any claims excepting these and one small note, which note White desired should also be given up, and was told by the plaintiff that if he gave up the other claims, he ought not to be called upon to give up that small note; and this was assented to by White, and the agreement received by him with the distinct understanding that it was in settlement of all claims but the small note. The plaintiff objected to this evidence, upon the ground that the writing was conclusive as to what claims were excluded in the settlement; "and, for the purposes of the trial, the court so ruled, and excluded the parol evidence offered." To this ruling the defendant excepted.

The defendant then contended that as it appeared from the plaintiff's case, that the note which the mortgage was given to secure had, subsequently to the acts complained of, been given up by the plaintiff to be cancelled, and had been cancelled accordingly, this action could not be maintained. "The court, for the purposes of the trial, ruled accordingly;" a verdict was taken for the defendant, and the plaintiff excepted to this ruling.

C. Delano & S. T. Field, for the plaintiff, cited, in support of the plaintiff's exceptions, *Rice* v. *Rice*, 4 Pick. 349; *West* v. *Chamberlin*, 8 Pick. 336; *Davis* v. *Maynard*, 9 Mass. 242;

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Perkins v. *Pitts*, 11 Mass. 125; *Smith* v. *Johns*, 3 Gray, 517; *Baldwin* v. *Norton*, 2 Conn. 161; *Loud* v. *Lane*, 8 Met. 519; *Gibson* v. *Crehore*, 3 Pick. 475; *Thayer* v. *Mann*, 19 Pick. 535; *Pomroy* v. *Rice*, 16 Pick. 22; Judge Trowbridge's Reading, 8 Mass. 554; *Parsons* v. *Welles*, 17 Mass. 419; *Howe* v. *Lewis*, 14 Pick. 329; *Sherman* v. *Abbot*, 18 Pick. 448; *Howard* v. *Howard*, 3 Met. 548; *Farrar* v. *Farrar*, 4 N. H. 191; 1 Greenl. Ev. § 265; 2 Bl. Com. 177; and against the defendant's exceptions, *Stackpole* v. *Arnold*, 11 Mass. 27; *Brown* v. *Saltonstall*, 3 Met. 426; *West Boylston Manuf. Co.* v. *Searle*, 15 Pick. 225; *Whitwell* v. *Willard*, 1 Met. 216; *Maryland & New York Coal & Iron Co.* v. *Wingert*, 8 Gill, 170; 1 Greenl. Ev. §§ 275, 277, 295.

G. T. Davis & W. Griswold, for the defendant, cited, against the plaintiff's exceptions, *Southerin* v. *Mendum*, 5 N. H. 429; *Smith* v. *Moore*, 11 N. H. 61; *Glass* v. *Ellison*, 9 N. H. 72; *Sanders* v. *Reed*, 12 N. H. 561; *Eaton* v. *Whiting*, 3 Pick. 484; *Wade* v. *Howard*, 11 Pick. 289; *Maynard* v. *Hunt*, 5 Pick. 240; 4 Kent Com. (6th ed.) 160, 161; *Abbott* v. *Upton*, 19 Pick. 434; *Holman* v. *Bailey*, 3 Met. 57; *Spring* v. *Gray*, 5 Mason, 527; and in support of the defendant's exceptions, *Baker* v. *Briggs*, 8 Pick. 122; *Wade* v. *Howard*, 11 Pick. 289; *Gerrish* v. *Washburn*, 9 Pick. 338; *Badger* v. *Jones*, 12 Pick. 371; *Brooks* v. *White*, 2 Met. 283; *Clapp* v. *Tirrell*, 20 Pick. 247; *Wilkinson* v. *Scott*, 17 Mass. 249; *Kendall* v. *Bates*, 35 Maine, 358.

Dewey, J. 1. The ruling of the court of common pleas, that the note having been given up by the plaintiff to the defendant to be cancelled, under the circumstances stated, the action therefore could not be maintained, was erroneous. The inquiry was open whether this was a payment of the note, or a mere release of the defendant from personal liability on the note, independent of the lien on the land. If the debt was not in fact paid, and the land was still to be charged with the same by the arrangement of the parties to this settlement, the mere giving up of the note would not discharge the mortgage.

2. The further ruling of the court, excluding the proposed evidence to show that the alleged conversion and the various trespasses set forth as the ground of the present action were all

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adjusted and settled by the parties at the time of the giving up of the note, and as a part of that transaction, was also erroneous; such evidence, in the opinion of this court, being competent, and not excluded by the written paper given by the plaintiff and executed on the 24th of April 1858.

Exceptions of both parties sustained

ROSWELL M. RICHARDSON & others *vs.* STILLMAN THOMAS & others.

The insertion of a debt in the schedule of creditors, filed and sworn to by a debtor under proceedings in insolvency, is not such an acknowledgment as will take the debt out of the statute of limitations.

The payment of a dividend by an assignee under the insolvent laws will not take the residue of the debt out of the statute of limitations as against the debtor.

The pendency of proceedings in insolvency against the debtor does not suspend the operation of the statute of limitations in his favor.

ACTION OF CONTRACT on a promissory note. Trial and verdict for the plaintiffs at November term 1858 of the court of common pleas in Franklin, before *Briggs*, J., to whose rulings the defendants alleged exceptions, the substance of which is stated in the opinion.

D. W. Alvord, for the defendants.

A. Brainard, for the plaintiffs.

SHAW, C. J. The note on which this action was brought was dated May 21st 1851, payable in three months. Of course the cause of action occurred on the 24th of August 1851. More than six years elapsed before this action was brought, on the 8th of June 1858. The statute of limitations is therefore *prima facie* a bar, and is relied on in the answer in this case. The plaintiffs seek to avoid this effect, by the facts, that before the note became due the defendants were put into insolvency by their creditors; that their property was assigned; that they returned the plaintiffs' note in their schedule, as a debt due; that

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the plaintiffs proved their debt, and received a dividend, but the defendants never obtained a discharge; and that the proceedings in insolvency were pending until the 9th of July 1852.

The court are of opinion that the statute bar is not avoided by the facts stated. The case is precisely within the authority of *Stoddard* v. *Doane*, 7 Gray, 387, and *Roscoe* v. *Hale*, 7 Gray, 274, which were probably not published when this case was prepared. In one circumstance it differs, namely, that in those cases the proceeding was voluntary; here it was *in invitum*. So far as this circumstance goes, it makes the case more favorable for the defendants; because it cannot here be said that they voluntarily commenced a course of proceedings which led to the acknowledgment of the debt by their schedules, and the payment by the assignee, which are the significant acts relied on to avoid the statute bar.

But we are of opinion that those decisions are right upon principle. The defendants, as insolvents, were bound by their duty and by their oath, to present the plaintiffs' debt in their schedule as a debt due. And the fact was then strictly true; it was a debt due, not barred by the statute of limitations.

So the subsequent payment of a dividend, by the assignee, was made in pursuance of his legal duty, under the order of a judge of competent legal authority to distribute the proceeds of a fund, set apart and sequestered for that purpose, amongst those persons who were creditors on the day of the first publication of the official notice of insolvency.

On what ground is it that the acknowledgment of a debt in the ordinary course of business, or a payment, takes the case out of the statute? Plainly because, being done voluntarily by the debtor, each is a significant act, on the part of the debtor, admitting the debt to be due, and his liability to pay it, from which the law implies a promise to do so. Can such an inference be drawn from an acknowledgment, which the debtor is bound by a legal requisition, under a heavy penalty, to make, and as a step in the course of a series of legal proceedings, which, when rightly conducted, is designed to lead, as one of its appropriate objects, to the discharge of that very debt.

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The same thing may be said of the payment of a dividend by the assignee. It is not the act of the debtor or of his agent. The debtor cannot, if he would, hinder or control it. The assignee is an officer of the law, and makes the payment in pursuance of his legal duty, under the direction of a judicial officer. It enures by way of payment to the creditor, only because it diminishes the debt *pro tanto*, by a collateral proceeding, by the application of a fund no longer under his control, and by an act which implies no action of his mind.

The pendency of proceedings in insolvency does not suspend the right of the creditor to bring his action against the debtor on his original cause of action, or suspend the operation of the statute of limitations on that cause of action. The only effect which it does have practically is, by appeal to the discretion of the court to stay the proceedings temporarily, to give the debtor a reasonable opportunity to obtain his discharge, which, if obtained, may be pleaded in bar. *Collester* v. *Hailey*, 6 Gray, 517.

Nor do any of the authorities cited have a contrary bearing. They tend to prove that the statute of limitations does not run against the right of the creditor to prove his debt against the estate of the insolvent, in competition with his other creditors, provided he had a good cause of action, not barred by the six years limitation, at the time of the first publication of notice of the insolvency. *Willard* v. *Clarke*, 7 Met. 435. *Collester* v. *Hailey*, 6 Gray, 517. *Stoddard* v. *Doane*, 7 Gray, 387.

But it is a very different question, whether the same statute is a bar to the creditor, suing the debtor in a common law action, upon the original cause of action. The reasons for this are obvious and are fully stated in the cases cited.

Exceptions sustained.

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INHABITANTS OF GREENFIELD *vs.* WILLIAM WILSON & others.

The provision of *St.* 1845, *c.* 70, § 2, that in actions on constables' bonds "the like proceedings shall be had as in a suit by a creditor on administration bonds," does not require the action to be brought in this court.

The attachment by a constable on mesne process of the property of one not the defendant is a breach of the condition of the constable's bond.

An unsatisfied judgment against a constable for the conversion of property wrongfully attached by him is no bar to an action upon his bond.

ACTION OF CONTRACT, brought for the benefit of Hugh E. Kenran, upon the bond given by Wilson as a constable of the town of Greenfield.

At the trial in the court of common pleas in Franklin at March term 1859, it appeared that Wilson, in his capacity of constable, in serving a writ issued by a justice of the peace, in a civil action against one Kellogg, attached and took a rifle, the property of Kenran, and refused to deliver it up to Kenran on demand; whereupon Kenran sued him for the conversion, and recovered judgment, upon which execution issued and was returned unsatisfied, after which this suit was commenced.

The defendants contended that upon this evidence the action could not be maintained. But *Mellen*, C. J. ruled that the plaintiffs were entitled to recover. A verdict was taken for the plaintiffs, and the defendants alleged exceptions.

C. Allen, for the defendants. 1. Kenran's judgment against the constable bars this action. It is a general rule that a judgment, obtained against one of several who are jointly liable either for a tort or upon a contract, precludes the plaintiff from afterwards proceeding against the others. 1 Chit. Pl. (6th Am. ed.) 44 *note*, 89. *King* v. *Hoare*, 13 M. & W. 494. *Olcott* v. *Little*, 9 N. H. 259. *Ward* v. *Johnson*, 13 Mass. 148. *Gibbs* v. *Bryant*, 1 Pick. 118. A judgment and execution in trover against one bars an action against another for the same cause. Com. Dig. Action K. 4. So as to trespassers. *Livingston* v. *Bishop*, 1 Johns. 290.

Judgment and execution against the plaintiff in a suit for

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attaching the goods of a third person, although unsatisfied, will bar a suit against the officer. *White* v. *Philbrick*, 5 Greenl. 147. So judgment and execution against a deputy sheriff will bar a suit against the sheriff. *Campbell* v. *Phelps*, 1 Pick. 62. The judgment against the constable vested the property in him. *Broome* v. *Wooton*, Yelv. 67. *Campbell* v. *Phelps*, 1 Pick. 67. It is same cause of action, where the action is supported by the same evidence, without regard to the form. *Rice* v. *King*, 7 Johns. 20. *Smith* v. *Finley*, 2 Penning. 105.

There are authorities, that where no statute requires a previous suit against the constable, the suit may be brought directly on the bond. *Bagby* v. *Chandler*, 8 Alab. 230. *Governor* v. *White*, 4 Stew. & Port. 441. *Governor* v. *Perkins*, 2 Bibb, 395. The case of *Lowell* v. *Parker*, 10 Met. 309, was founded on the *St.* of 1838, *c.* 181, § 3, which required a previous suit against the constable. There is no statute requiring such previous suit in this case. *Sts.* 1845, *c.* 70, §§ 1, 2; 1851, *c.* 94, §§ 1, 2.

2. But if the true construction of the statutes requires that there should be a previous suit against the constable, the same construction and analogy require the suit to be commenced in the supreme judicial court, as in *Lowell* v. *Parker*. Rev. Sts. *c.* 70, § 10.

3. The attachment of a third person's goods was *extra officium*, and not within the condition of the bond.

S. O. Lamb, for the plaintiffs.

Metcalf, J. This action, we think, was rightly commenced in the court of common pleas. We understand that the provision in *St.* 1845, *c.* 70, § 2, that in actions on constables' bonds "the like proceedings shall be had as in a suit by a creditor on administration bonds," was intended merely to direct the form of proceedings in such actions, and not to give to the supreme judicial court exclusive jurisdiction thereof, like its jurisdiction under the Rev. Sts. *c.* 70, of actions on administration bonds. In *Lowell* v. *Parker*, 10 Met. 309, no question of the jurisdiction of the court was raised.

It is also our opinion that an attachment, by a constable, of

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the property of A. on a process against B. is a breach of the condition of his official bond given for the faithful performance of his duties in the service of civil processes. *Archer* v. *Noble*, 3 Greenl. 418. *Brunott* v. *M'Kee*, 6 W. & S. 513. *State* v. *Jennings*, 4 Ohio State R. 418. Such act is a breach of the condition of a coroner's and of a sheriff's official bond. *Harris* v. *Hanson*, 2 Fairf. 241. *Carmack* v. *Commonwealth*, 5 Binn. 184. *People* v. *Schuyler*, 4 Comst. 173.

The only other question is, whether the recovery of a judgment by Kenran against Wilson, for the conversion of the rifle, which judgment is unsatisfied, is a bar to this action. And we deem it perfectly clear that it is not. In *Carmack* v. *Commonwealth*, above cited, this precise point was adjudged. But we need no precedent. Officers are, by the common law, answerable for legal injuries done by their official acts, or acts under color of office. But they may not have pecuniary ability to pay the damages that may be recovered against them; or they may dishonestly avoid payment. Hence the statute requisition that they shall give bonds, with sureties, for the faithful performance of their official duties; thus giving to a party injured by the officer's acts a cumulative remedy, that is, a remedy in addition to an action against the officer, founded directly on his misdoings. Undoubtedly such party can have only one satisfaction; but a judgment, in an action brought against the officer for his misdoings, is not *per se* a satisfaction for the party's injury. It may be wholly worthless; and while it is unsatisfied, it can be no bar to an action on the officer's official bond. Indeed, the Rev. Sts. *c.* 14, § 65, provide that no action shall be brought on a sheriff's bond, until the party bringing it has recovered judgment against the sheriff or his legal representatives, &c.; and that, in a suit on the bond, execution shall issue for the amount of such judgment, or such part thereof as shall be unsatisfied. *Exceptions overruled.*

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CHARLES MATTOON, Judge of Probate and Insolvency, *vs.* HOWLAND COWING & CHARLES A. PIERCE.
SAME *vs.* HOWLAND COWING & ZEBEDIAH GRAVES.

A guardian, licensed to sell real estate of his ward for the purpose of investment, did not duly invest the proceeds, but charged himself with such proceeds and with interest thereon from year to year in his general guardianship account, which was allowed by the court of probate, and expended sums equal to such interest for the support of his ward. *Held*, that he was responsible for such proceeds upon the special bond given by him on obtaining the license; but for the interest thereon, upon his general bond.

A guardian is responsible on his general bond, for money due from him to his ward at the time of his appointment, and for the rent of real estate occupied by the guardian before that time.

A guardian, who was also executor of a will in which his ward was residuary legatee, paid out for the support of his ward, as appeared by his guardianship account as allowed, more than he received as guardian. *Held*, that the excess should have been credited to him in his executor's account as paid over to himself as guardian, and charged to him in his guardianship account; and that if not so done in form, it should be deducted from the liability of himself and his sureties on his bond as executor.

HOAR, J. The second of these suits is brought upon two bonds, in which Howland S. Cowing was principal, and Howland Cowing and Zebediah Graves were the sureties; one given by the said H. S. Cowing, as executor of the will of Emily Russell, and the other as the guardian of Charles H. Russell, a minor son and residuary devisee and legatee of the said Emily.

The first suit is upon a special bond, given by H. S. Cowing, upon obtaining a license from the probate court to sell certain real estate of his ward for the purpose of investment, upon which bond Howland Cowing and Charles A. Pierce were sureties.

Howland S. Cowing is deceased, insolvent. Before his death, he settled two accounts in the probate court as executor, but never settled any account as guardian. His administrator has presented a final account of his doings as executor, and his account as guardian, both of which have been allowed. It appears that the guardian was twice licensed to make a sale of the real estate of his ward; that under the first license he gave a bond which is not now in suit, and sold real estate to the amount of $620; that under the second license he gave the

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bond which is sued as above stated, and sold real estate to the amount of $1,600; that both of these sums have been charged to him in his guardian's account, with the annual interest accruing upon them; that he invested the $620 only in a note for that sum of a firm of which he was a member, which firm were insolvent at the time their note was thus taken; that he never actually invested the $1,600, but appropriated the same to his own use; that by the final executor's account, as it was allowed, there appeared a balance due from the executor of $1,611.87, and by the account of guardianship a balance due from the guardian, including the proceeds of the sale of the real estate, of $1,344.51.

Upon these facts the court is called upon to determine the respective liability of the sureties to the several bonds in suit.

In the first place, the license to sell the real estate was in each instance for the purpose of investment, under the second section of the seventy-second chapter of the revised statutes; and the special bond was given, provided by section 10 of the same chapter. No investment, such as the statute contemplates, was actually made; for we cannot regard the nominal investment of the $620 as anything but a pretence and a fraud. The money never having been invested, the sureties under the special bonds are responsible for it, because the condition of those bonds has never been performed. There are two purposes for which a guardian, under the provisions of the 72d chapter of the revised statutes, can be licensed to sell the real estate of his ward. The first is that named in the first section, when the income of the ward's estate is insufficient for his maintenance. The other, for which the second section provides, is when the estate is not needed for his maintenance, but it appears to be for the benefit of the ward that the investment of his property should be changed from real to personal estate. In the first case, so much of the proceeds of the sale as may be required for immediate use may be expended by the guardian, and the remainder invested until it shall be needed for the support of the ward, when the capital, as well as the income, may be expended at the discretion of the guardian, like other personal property of the

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ward. But when the sale is for the purpose of investment, it is not intended that the capital shall be at the disposal of the guardian, and he has no right to use it for the maintenance of the ward, so long as there are any other funds in his hands applicable to that purpose. By the 5th section, any surplus which may remain after the final settlement of the guardianship account is to be considered as the real estate of the ward, and to go to the same persons who would have been entitled to the real estate if it had not been sold. The capital, therefore, of the proceeds of the sale of the real estate, which should have been, but was not invested, is chargeable to the guardian on his special bonds, and not on his general account.

But the interest upon these sums stands upon a different ground. If the investment had been made according to the provisions of the license to sell, the income of such investment would be applicable to the maintenance of the ward, by the guardian, like the income of any other estate under his control. And although no income has actually been received, yet as the administrator of the guardian has charged himself with it, from year to year, as if it had been received, in the general guardianship account, which has been allowed in that form, and as the guardian actually expended a corresponding sum in the support of his ward, we think it is to be treated as if it had been received and accounted for, and that the sureties in the special bond were exonerated to that extent.

It is argued on behalf of the sureties on the special bond, that the guardian having been charged with the proceeds of the sale of the real estate, in his general account of guardianship, and that account having been allowed, they are therefore discharged, and the whole liability transferred to the sureties under the guardian's general bond. But the contrary was determined in the case of *Lyman* v. *Conkey*, 1 Met. 317, where it was held, that although it was conclusively settled by the allowance of the guardian's account, that he was chargeable with the whole balance thereby appearing to be due, yet that it was not conclusive upon the question, which class of sureties would be responsible for his failure to do with such balance what his

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duty and the order of the court required; and that this responsibility would depend upon the source from which the money charged to him in the account was derived.

The deduction from the guardianship account of the principal sums received from the sale of the real estate would leave a balance in favor of the guardian upon his general bond. And the sureties upon that bond contend that it should be further increased by a deduction of three items; the first, an item of cash due to the ward, and received by Cowing before his appointment as guardian; and the other two, for rent of the real estate of the ward, occupied by Cowing before his appointment. The reason given for this deduction is, that "the sureties in Cowing's bond as guardian are not liable for his doings before he was appointed guardian." But these were debts due from him to his ward at the time of his appointment. It would have been the duty of any other person who might have been appointed guardian to collect them, and apply them to the use of the ward. Cowing, who was himself the debtor, being appointed the guardian, could only collect them from himself by including them in the inventory of his ward's estate as assets in his hands to be accounted for, and by charging himself with them in his guardianship account. This has been properly done in the account which has been settled.

The remaining question is upon which of the bonds, that given by Cowing as executor, or that given as guardian, he is to be held responsible for the balance unexpended of the estate, which in equity belongs to his ward. The question is of no practical importance in the case before us, because the sureties upon the two bonds are the same, and one suit is brought upon both. But as the guardian appears by his account, as it has been allowed, to have paid out more than he has received as guardian for the support of his ward; as the guardian and executor were the same person; as the balance of the estate in his hands as executor belonged to his ward, and should have been transferred to himself as guardian, if the final account as executor had been properly stated and settled; and as the guardian actually expended for his ward more than he received from

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any other source which he could rightfully appropriate to his support; equity will regard him as having, in his capacity of executor, furnished the funds to himself as guardian, which he has thus disbursed for his ward's benefit, and will allow them in reduction of the liability of his sureties on his bond as executor. It would have been more correct, in form, if these sums had been credited, in making up his account as executor, as paid over to the guardian, and charged to the guardian as received from the executor. But such seems to us the substance and real nature of the transaction, and we think the facts proved show a sufficient discharge of so much appearing due on the executor's account as was thus applied. The balance due the guardian is therefore to be deducted from the balance appearing to be due from the executor, and after deducting one hundred dollars more by agreement of the parties, as the amount of a legacy paid by the executor, and accidentally omitted to be credited in his account, judgment will be entered for the plaintiff in both suits in conformity with these principles.

C. Allen, for the plaintiff, cited *Lyman* v. *Conkey*, 1 Met. 322; *Benchley* v. *Chapin*, 10 Cush. 173; *Ipswich Manuf. Co.* v. *Story*, 5 Met. 513; *Fay* v. *Taylor*, 11 Met. 529.

S. O. Lamb, for Pierce, cited Rev. Sts. *c.* 79, § 5; *Fay* v. *Taylor*, 11 Met. 529; *Hall* v. *Cushing*, 9 Pick. 395; *Conkey* v. *Dickinson*, 13 Met. 51.

D. W. Alvord, for Graves, cited Rev. Sts. *c.* 72, §§ 4, 10; *Lyman* v. *Conkey*, 1 Met. 317, 323; *Fay* v. *Taylor*, 11 Met. 529, 534, *Brooks* v. *Brooks*, 11 Cush. 18; *Prior* v. *Talbot*, 10 Cush. 1

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Joseph O. Hollis & another *vs.* Gideon D. Richardson.

In an action by a person other than the payee, on a promissory note not negotiable, a declaration, averring that "the defendant made a promissory note, a copy whereof is hereto annexed, payable to J. S., and the plaintiff is the owner of said note, and the defendant owes him the amount of said note," and annexing a copy of the note, but not averring any assignment thereof to the plaintiff, is insufficient: and a judgment rendered thereon by default will be reversed on error.

Writ of error on a judgment of the court of common pleas in an action of contract brought by Gideon D. Richardson upon two promissory notes made by the plaintiff in error, and payable to Eliphalet W. Richardson, but not purporting to be payable to order.

In that action, each count was in this form: "And the plaintiff says, the defendants made a promissory note, a copy whereof is hereto annexed, payable to Eliphalet Wharff Richardson, and the plaintiff is the owner of said note, and the defendants owe him the amount of said note and interest thereon." Copies of the notes were annexed to the declaration. The defendants filed an affidavit of merits, but were afterwards defaulted, and judgment was rendered against them for the amount claimed.

The error assigned was, that the notes were not negotiable, and were not made to Gideon D. Richardson, and he could maintain no action at law thereon. Plea, *in nullo est erratum*.

G. T. Davis & C. Allen, for the plaintiffs in error.

D. Aiken, for the defendant in error. The assignee of a chose in action, not negotiable, may sue thereon in his own name, if the debtor has promised to pay the debt to him, or recognized him as his creditor. *Folsom* v. *Haskell*, 11 Cush. 470. *Coolidge* v. *Ruggles*, 15 Mass. 387. This declaration sufficiently states a cause of action, by averring the making of the note, the plaintiff's ownership thereof, and that "the defendants owe him the amount of said note." The court below must be presumed to have had proper evidence before it. No error appears of record. Papers and documents filed in the case, whether in support of

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the action, or to prove damages after a default, are not part of the record; and the only remedy for the admission of improper evidence is by exceptions. *Storer* v. *White*, 7 Mass. 448. *Pierce* v. *Adams*, 8 Mass. 383. *Coolidge* v. *Inglee*, 13 Mass. 50.

The error assigned is an informality, at most, which, if seasonably suggested, could have been cured by amendment. The defendants, by suffering a default after filing an affidavit of merits, admitted the correctness of the declaration, and waived any right to object to its sufficiency. *Kidder* v. *Browne*, 9 Cush. 402. *Clark* v. *Montague*, 1 Gray, 448, 449. *Simonds* v. *Parker*, 1 Met. 511, 512.

Shaw, C. J. The ground of this writ of error is, that the declaration shows no cause of action in the plaintiff. The judgment having been rendered upon the default of the defendant, the case is not within the provisions of the new practice act, which prohibit the taking of objections in arrest of judgment or by writ of error, for causes existing before verdict, in any case in which a verdict has been rendered. *St.* 1852, *c.* 312, §§ 22, 77.

It was not a question of the admission or rejection of evidence, which, if not made at the trial, cannot be taken afterwards; because there was no trial. Nor did the court below adjudge the sufficiency of the evidence to maintain the action; for, the judgment being on default, no evidence was laid before them.

Nor is it a case within the rule of the common law, where a good title, or cause of action, imperfectly set out in the declaration, may be cured by a verdict. The reason is, that a verdict presupposes a trial, and the action of the judge on the matter of law; and the court therefore, after verdict, will presume that the evidence necessary to support the action was required and given, though such good title and legal cause of action were not correctly stated.

The question is, whether there is enough in the declaration, of which the notes themselves are part, and of course, part of the record, to sustain the judgment. The declaration sets forth the making of a note payable to a person other than the plaintiff,

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and not negotiable. It then adds that "the plaintiff is the owner of said note." But how can he own it? Only as assignee in equity, which, by law, does not enable him to sue in his own name.

It is said, however, that there may have been an express promise by the defendants to pay the plaintiff. But if that was so, the declaration should not have been on the note, but on the new and express promise, of which the assignment of the note was the consideration. *Mowry* v. *Todd*, 12 Mass. 281. By the practice act, although the facts may be briefly stated, all the facts must be stated which are necessary to constitute the cause of action. *St.* 1852, *c.* 312, § 2, *cl.* 3. This declaration does not state the facts, if they in truth existed, that the notes had been assigned to the plaintiff, and that, upon notice thereof, the defendants had made an express promise to him to pay them.

The plaintiff's final averment, "that the defendants owe him the amount of said note," is a mere statement of a conclusion of law from facts previously stated, and not an allegation of a distinct substantive fact. *Millard* v. *Baldwin*, 3 Gray, 484. It it could be treated as a distinct and sufficient averment, no other averment would be needed in any case.

Judgment reversed.

MARK MOORE *vs.* RICHARD LYMAN.

The fact that an appeal was taken can be proved by the record only; and not by the statements of the appellee in a complaint filed by him for affirmation of the judgment.

A motion of the plaintiff to dismiss an appeal from a judgment of a justice of the peace on the ground that his record does not show that an appeal was taken, need not be made at the first term.

On the dismissal, on the plaintiff's motion, of an appeal of the defendant, the plaintiff is entitled to costs.

ACTION OF CONTRACT, commenced before a justice of the peace in Franklin, who on the 10th of April 1858 gave judgment for the plaintiff.

At November term 1858 of the court of common pleas, the

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plaintiff made a complaint for affirmation of that judgment, in which, after stating the judgment, he averred that "from said judgment the said Lyman appealed to this honorable court, and recognized to prosecute the same, but failed so to do." Notice of this complaint was given to the defendant, and he appeared and opposed the complaint, and also presented a petition for leave to enter his appeal. The court dismissed the plaintiff's complaint for affirmation of judgment, and granted the defendant's petition.

The defendant thereupon filed a paper which contained only a copy of the writ, a statement of a continuance, and of judgment for the plaintiff, and a taxation of the costs of each party, and was certified by the justice to be "a copy of the writ, plaintiff's and defendant's costs, and judgment." And the case was continued to March term 1859, and thence, under the *St.* of 1859, *c.* 196, to August term of the superior court, when the defendant filed an answer to the merits.

The plaintiff, after opening the case, moved to dismiss the action. The defendant resisted the motion, and claimed a trial of the action upon the merits; and offered evidence that, when judgment was rendered against him by the justice, he claimed an appeal to the next court of common pleas, and was ready and offered to recognize, according to law, to prosecute his appeal with effect; and that he demanded of the justice a copy of his record, and of all the papers filed, and the justice furnished him with the record now on file, declaring it to be a full copy. And the defendant contended that he had produced as full and perfect papers, as it was in his power to produce. But *Rockwell*, J. rejected the evidence, and ordered the action to be dismissed, and also overruled a motion of the defendant to be allowed his costs. The defendant alleged exceptions.

D. W. Alvord, for the defendant. 1. The action was wrongly dismissed. (1.) The court appealed to, and not the court appealed from, is to judge whether the party had a right of appeal or not; and if the court appealed from refuses or omits to allow the appeal, when the party claiming it has a right to appeal, the court appealed to will hear evidence of the facts and entertain

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the appeal. *Commonwealth* v. *Dunham*, 22 Pick. 11 *Frazer* v. *Smith*, 6 Blackf. 210. *Lacy* v. *Fairman*, 7 Blackf. 558. *Louderback* v. *Boyd*, 1 Ashm. 380. (2.) The plaintiff having, in his petition for affirmation of the justice's judgment, recited the fact that the defendant appealed, was thereby estopped to deny the appeal. *Montague* v. *Smith*, 13 Mass. 396. *Huntington* v. *American Bank*, 6 Pick. 340. (3.) The grounds for dismissing the action being apparent upon the face of the proceedings, the motion to dismiss, being made at the third term after the appeal was entered, came too late. *Simonds* v. *Parker*, 1 Met. 508. *Elder* v. *Dwight Manuf. Co.* 4 Gray, 201.

2. The defendant was the prevailing party, and entitled to costs. Rev. Sts. *c.* 121, § 1. *Davis* v. *Hastings*, 8 Cush. 313.

A. Brainard, for the plaintiff, being directed by the court to confine himself to the question of costs, cited *Bowler* v. *Palmer*, 2 Gray, 553.

By the Court. The fact that an appeal was taken cannot be proved except by the record. *Sayles* v. *Briggs*, 4 Met. 421 Nor can the want of a record be supplied by the statements of the plaintiff in a petition filed by him. *Exceptions overruled, with costs in the courts below and in this court.*

Elijah Adams *vs.* Lucien H. Stone.

A debtor arrested on execution, who enters into a recognizance, under *St.* 1857, *c.* 141, § 10, to deliver himself up for examination within ninety days, giving notice as provided in that statute, is bound to procure the attendance of a magistrate, qualified by law to take the examination, within the hour specified in his notice; and if the magistrate does not appear within the hour, the debtor cannot be discharged without a new notice to the creditor.

A recognizance, which recites the obligee's recovery of judgment against the debtor, the issue of an execution thereon, the taking of the oath required by law in behalf of the plaintiff, the magistrate's certificate that he was satisfied that there was reasonable cause to believe the truth of the facts sworn to, the arrest of the debtor, and that he was brought before the magistrate for examination, and did not desire any time fixed for examination, and offered this recognizance, which was accepted; and which is conditioned that the debtor "shall, within ninety days from the time of his arrest, deliver himself

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up for examination, giving notice thereof as in the statutes in that behalf provided," &c. is sufficient, under the St. 1857, c. 141, § 10, without stating that the debtor desired to take the poor debtor's oath, or more definitely naming or describing the magistrate before whom he is to deliver himself up.

ACTION OF CONTRACT against the surety upon a recognizance taken before Samuel O. Lamb, a master in chancery for the county of Franklin, on the 15th of September 1858, under *St.* 1857, *c.* 141, the condition of which recited the plaintiff's recovery of judgment against the principals; the issue of an execution thereon; the oath of the plaintiff's attorney, before the master, that twenty dollars, exclusive of costs, remained due and uncollected on the execution, and that he believed and had reason to believe that each of the defendants named in the execution had property not exempt from being taken on execution, which he did not intend to apply to the payment of the plaintiff's claim; the annexing to the execution of the master's certificate, that he was satisfied that there was reasonable cause to believe the truth of the charge; that by virtue of said execution, with the certificate annexed, and for want of goods, chattels or lands of said defendants, their bodies have been taken by a deputy sheriff, and brought before the master for examination, and that the debtors did not desire any time fixed for their examination, and offered to recognize, with the defendant as surety, &c.; and the master's acceptance of the recognizance: "Now if the said defendants shall, within ninety days from the time of their arrest, deliver themselves up for examination, giving notice thereof, as in the statutes in that behalf provided, and shall make no default at any time fixed for their examination, and shall abide the final order of the magistrate thereon, then this recognizance shall be void; otherwise, to remain in full force and virtue."

The breach assigned was the failure of the principals to deliver themselves up within ninety days. Answer, that they did deliver themselves up within that time, and were examined by the master, and the oath for the relief of poor debtors was administered to them by him, and they were discharged.

The certificate of discharge relied on stated that on the 7th

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of December 1858 the debtors caused notice to be given to the plaintiff that they desired to take the oath for the relief of poor debtors at the office of Lamb in Greenfield on the 11th of December at ten o'clock in the forenoon; the service of said notice upon the plaintiff; "that at the time fixed for the examination, and from that time till after twelve o'clock, the master was not present at the place appointed, being engaged in the court near by, but expecting and intending to attend to said examination, when notified that the parties were ready to proceed with the same, having requested one of said debtors to inform me when the parties were so ready, but he did not so inform me, and I was not requested to attend;" that, as the master was informed and believed, the debtors and the attorney of the creditor attended at the appointed time and place; that at two o'clock in the afternoon of the same day, the master and the debtors were at the place appointed, and the attorney of the creditor was notified that the debtors would submit themselves to examination, but declined to attend; and thereupon, at the request of the debtors, the master proceeded with the examination, which was afterwards adjourned till the 13th, and the attorney of the creditor was notified of the time and place of the adjournment, but again declined to attend; and upon the 13th of December the examination was proceeded with, and the oath for the relief of poor debtors administered.

At the trial in the superior court in Franklin at August term 1859, before *Rockwell*, J., the plaintiff called Lamb as a witness, who testified to the truth of the facts stated in the certificate of discharge; and further testified that one of the debtors was with him in his office, before the appointed hour, and that he then arranged for the examination as stated in the certificate, and left the office at a quarter before nine o'clock, and did not return until the time stated in the certificate.

It was admitted at the trial that the debtors and the creditor's attorney were present at the place and time appointed for examination, but the attorney had no notice of any arrangement between the magistrate and the debtors, but did understand that the former was at the court house. It was also admitted

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that the creditor was legally notified of the first meeting and of the subsequent adjournments as stated in the certificate. The debtor who made the arrangement with the master testified that he did not understand that he was to give notice to said Lamb when the parties were ready, but understood that said Lamb was to be at his office at the appointed time.

The defendant objected to the recognizance, that it did not show any sufficient cause for taking it; and that it did not appear where or before whom the debtors were to deliver themselves up for examination, and that it was otherwise informal and defective; but the court overruled the objection. The defendant then requested the court to rule that upon the foregoing evidence the plaintiff was not entitled to recover; but the court ruled otherwise. A verdict was taken for the plaintiff, and the defendant alleged exceptions.

A. Brainard, for the defendant. 1. The magistrate had jurisdiction. He had issued the notice, and agreed to attend. He took the examination, administered the oath, and granted the certificate. *St.* 1857, *c.* 141. The creditor had full and proper opportunity to be heard, having had due notice of the day fixed for the examination, and of the adjournment. His rights have not been infringed. The debtors acted in good faith. *Niles* v. *Hancock*, 3 Met. 568.

2. The recognizance is not in conformity with the requirements of law. It does not recite a sufficient cause of its caption. *Commonwealth* v. *Downey*, 9 Mass. 520. *Commonwealth* v. *Daggett*, 16 Mass. 447. It does not state that the debtors desired to take the oath for the relief of poor debtors. *St.* 1857, *c.* 141, §§ 4, 10. It does not state before what magistrate they were to deliver themselves up; nor that they would deliver themselves up before some magistrate authorized to act.

G. T. Davis, for the plaintiff. 1. The debtors were bound to procure a magistrate competent to direct the examination, at the time and place when and where the creditor was cited to appear. *St.* 1857, *c.* 141, §§ 7, 10. The creditor's attorney was watching for the appearance of the magistrate, and in repeated attendance at the place appointed, during the whole appointed

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hour. After that hour, the magistrate, not having appeared, ceased to have jurisdiction of the case. *Hobbs* v. *Fogg*, 6 Gray, 254. *Blanchard* v. *Walker*, 4 Cush. 455. *Donner* v. *Hollister*, 14 N. H. 122. *Banks* v. *Johnson*, 12 N. H. 445. *Dyer* v. *Smith*, 12 Conn. 392. *Brown* v. *Stacy*, 9 Verm. 120. *Phelps* v. *Birge*, 11 Verm. 161.

2. The recognizance was properly taken, and in precise conformity with the statute.

DEWEY, J. The debtors were bound, under the recognizance, to procure the attendance of a proper magistrate qualified by law to take the examination and grant the discharge, if they would discharge themselves from the obligation they had assumed, "that within ninety days from the time of their arrest they will deliver themselves up for examination, giving notice thereof as in the statute is provided, and shall make no default at any time fixed for their examination." During the period of time at which, by force of the notice, the judgment creditor was bound to appear before the magistrate, neither Mr. Lamb, who gave the notice, nor any substitute, was present to hear the examination. The creditor appeared within the hour, thus manifesting his purpose to oppose the discharge, and having done so, and no magistrate appearing, no further proceedings could properly be had upon that notice, and he may now object to the same as invalid.

We perceive no objection to the form of the recognizance, and find stated in its recitals the cause of its being taken, and all that is necessary to its validity. *Exceptions overruled.*

JOHN B. FITZPATRICK *vs.* PATRICK FITZGERALD.

A deed of land to a Roman Catholic Bishop, and his heirs and assigns forever, "in trust for the Catholic community, for the purpose of a free burial ground," gives him an estate in fee; and he may maintain a writ of entry for the land against the *cestuis que trust*.

ACTION OF TORT for breaking and entering the plaintiff's close in Deerfield, and treading down the grass, and pulling up

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and carrying away and converting to the defendant's use certain stakes set in the soil.

The answer denied that the close was the property of the plaintiff; and alleged that it was purchased and paid for by the defendant and others for the purpose of a free Roman Catholic cemetery, and was conveyed to the plaintiff, to be held by him in trust for the Roman Catholic community, for the purposes of a free burial ground; that after the conveyance of the close to the plaintiff, in trust as aforesaid, the defendant, with the others who paid for the close, held public meetings for the purpose, among other things, of surveying and allotting off the close into burial lots, to carry into effect the objects of the subscription, purchase and conveyance; that at an appointed time the subscribers went upon the close, and marked out, allotted and staked out a number of lots; that the defendant and others, to whom lots were thus appropriated, had since, at considerable expense, put them in a suitable condition, and ornamented them with shrubs, flowers and shade trees, and the defendant and some others had made interments upon some of these lots; that the plaintiff and his agents, among others a Roman Catholic priest, had, during and since this allotment, been upon the land, had seen from time to time the progress of the work, had taken part in and assisted at funerals, and had acquiesced in the survey and allotment; that the plaintiff, or some persons acting, as the defendant believed, by his order, had since been upon the land and resurveyed the same, and pulled up and carried away the stakes set by the defendant and others around their lots, and had to some extent interfered with the graves therein; and that this was done by the plaintiff, in part for the purpose of selling the land, and thus defeating the object of the purchase, and that it divided the close into too many lots for the convenience of those wishing to use them, and made it necessary to remove many of the bodies interred there, and seriously injured the improvements made on the lots.

At the trial in the superior court in Franklin at August term 1859, the plaintiff put in evidence a deed by which David R. Wait and Charles N. Munroe, in consideration of a sum of

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money to them paid by "the Right Reverend John B. Fitzpatrick, Bishop of the Diocese of Boston, Massachusetts," conveyed "unto the said John B., his heirs and assigns," the close in dispute; "said tract to be held by said John B. in trust for the Catholic community, for the purpose of a free burial ground;" *habendum* "to the said John B., his heirs and assigns, to his and their use and behoof forever, in trust as aforesaid."

The defendant offered evidence to prove the facts stated in his answer. But *Rockwell*, J., being of opinion that the facts, if proved, would not constitute a defence to the action, rejected the evidence. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

W. Griswold, for the defendant.

G. T. Davis, for the plaintiff.

METCALF, J. The *St.* of 1855, *c.* 314, § 1, cannot be applied to the deed which conveyed the *locus in quo* to the plaintiff That conveyance is to him, and his heirs and assigns forever, and not to him "and his successors in any ecclesiastical office." He therefore took an estate in fee simple. And though he holds "in trust for the catholic community, for the purpose of a free burial ground," yet, as he is seised and holds in fee, he can maintain an action at law for any injury to the estate. Even when the *cestuis que trust* are individuals named, the trustee may maintain a writ of entry, ejectment or trespass *quare clausum fregit* against them. *Crane* v. *Crane*, 4 Gray, 323. *Roe* v. *Reade*, 8 T. R. 122, 123. *Beach* v. *Beach*, 14 Verm. 28. *Moore* v. *Spellman*, 5 Denio, 225. Lewin on Trusts, 482. There would doubtless be an exception to this rule of law in a case in which, by the terms of the trust, or by agreement of the trustee, the *cestuis que trust* were entitled to actual possession of the trust estate.

The answer of the defendant shows no breach of trust by the plaintiff; and if such breach were shown, it would be no defence to this action. The remedy of a *cestui que trust* for the trustee's breach of trust is not by taking the trust property into his own hands and forcibly withstanding the trustee's disposition of it. *Exceptions overruled.*

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Otis Clapp & others *vs.* Aurelia M. Rice & another, Administrators.

Parties who indorse their names on a promissory note before its delivery, for the benefit of the maker, are not liable as joint makers, if the payee afterwards indorses his name above theirs before the note is delivered; and other parol evidence is inadmissible to show that they were joint makers.

Where several persons indorse their names on a promissory note, in order to enable the maker to get it discounted; and some of them afterwards, on the failure of the maker, pay the note; they cannot maintain an action against the others for contribution, without proving that the relation between them was really that of cosureties. But parol evidence of that fact will maintain such an action.

Hoar, J. This case comes before us upon exceptions to a *pro forma* ruling of the judge before whom it was tried in the court of common pleas, that the plaintiffs were entitled to recover upon the facts appearing at the trial. The plaintiffs claimed contribution toward the payment of a promissory note which they had paid to the Franklin County Bank. The note was made by the Troy and Greenfield Railroad Company, and signed by W. T. Davis, the treasurer of the company, payable to the order of W. T. Davis, treasurer, and bore upon its back the indorsement of W. T. Davis, treasurer, and the names of the plaintiffs and of the defendants' intestate. The names of two of the plaintiffs appear before that of the defendants' intestate, and the name of the third follows it upon the back of the note. It appeared in evidence that the note was written and signed by Davis, the treasurer, and then, before it was indorsed by him, was sent in succession to the other parties, who placed their names upon it, in order to enable the railroad company to procure it to be discounted by the Franklin County Bank. After they had written their names upon it, he indorsed it as treasurer, above their signatures. It was then discounted by the bank, and was paid by the plaintiffs, upon the failure of the maker to pay it at maturity.

Upon these facts, the plaintiffs contend that the defendants' intestate was liable with them as a joint original promisor upon the note.

It is settled by a series of decisions in this Commonwealth

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that where a person not a party to a note puts his name upon it before it is delivered as a valid contract, he thereby makes himself an original promisor. The correctness of these decisions, however much they may be obnoxious to criticism upon principle, it is too late to question. They have formed an established rule for the construction of that class of contracts in Massachusetts, which cannot now be disturbed without manifest injustice.

But the doctrine is somewhat anomalous, and is not to be extended beyond the line of adjudged cases. When this note was first passed to any holder for value, so as to make it a valid contract, it was indorsed by W. T. Davis, treasurer, to whose order it was payable. It was therefore never a contract by which the plaintiffs were holden to Davis or to the railroad company. Their names were put upon it, with the obvious understanding and expectation that it would be indorsed by Davis before it should be negotiated. By his indorsement above their names, it was made, in form and effect, an indorsed note, with successive indorsements following. The bank took it in this form, complete and effectual, when it first had any validity; and it has been settled in the recent case of *Prescott Bank* v. *Caverly*, 7 Gray, 217, that under such circumstances it is not competent for the person whose name appears upon the note as an indorser, to show, by parol evidence, that his contract was different from that which such a signature ordinarily imports. See also *Bigelow* v. *Colton*, *ante*, 309; *Lake* v. *Stetson*, *ante*, 310 *note*.

In *Peirce* v. *Mann*, 17 Pick. 244, where the payee and owner of a negotiable note procured a third person to put his name upon the back of the note, in order to enable him to use it in payment of a debt, and, after the name was placed upon it, indorsed it himself above the signature of such person, it was held, that the latter was only liable as indorser; and the court said: "It is not unusual, in business, for a third person to indorse a note before it is indorsed by the payee, who is to put his name upon it at the time when it is discounted." We do not think it material in what order of time the several parties to a note affix their signatures, provided they are all placed

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upon it when it is first issued as a complete contract. When the paper upon which the plaintiffs' claim arises first became of any validity as a promissory note, the plaintiffs and the intestate were parties to it; and the cases cited of signatures by a person not a party have therefore no application. The decision of the court below was consequently erroneous and there must be a new trial.*

* Two similar decisions were made in Boston at January term 1860.

AUGUSTUS G. STIMSON & another *vs.* DANIEL SILLOWAY & another.

ACTION OF CONTRACT against Silloway and Poor as joint makers of a promissory note signed by Silloway, payable to H. W. Moulton, and indorsed "H. W. Moulton. David S. Poor." Silloway was defaulted.

At the trial in the superior court in Essex at September term 1859, the plaintiff introduced evidence tending to show that Moulton offered to the plaintiffs, in payment of a debt due from him to them, the note of Silloway, with the name of Poor thereon, and the plaintiffs accepted this offer; that, in pursuance thereof, Silloway, who assisted Moulton in making a settlement with the plaintiffs, procured the note now in suit, and gave it to the plaintiffs in payment of said debt of Moulton; and that Poor's name was on the note when Moulton indorsed it, and when it was negotiated. But *Morton*, J. ruled, that "inasmuch as Moulton was apparently the first, and Poor was apparently the second indorser on the note, the parol evidence offered by the plaintiff was incompetent to show that in truth and in fact Poor was a promisor." The plaintiffs submitted to a verdict for the defendant, and alleged exceptions, which were *Overruled by this court.*

E. F. Stone, for the plaintiffs.

B. Ives, Jr. for the defendants.

PETER POWERS *vs.* GARDNER K. EASTMAN.

ACTION OF CONTRACT by the plaintiff as indorsee against the defendant as indorser of a promissory note signed by Herrick & Tuttle, payable to the order of Eastman, and indorsed, "Waiving demand and notice, G. K. Eastman. Waiving demand and notice, Peter Powers." The defendant answered "that before said note was delivered to him, the note was indorsed by the plaintiff, whereby he became an original promisor and liable to the defendant as such."

At the trial in the superior court in Middlesex at September term 1859 before *Vose*, J., there was evidence that this note was made, without any consideration between any of the parties, to be discounted at a bank for the benefit of Herrick & Tuttle, and was signed first by Herrick & Tuttle, then by Powers, and then by Eastman, and discounted by the bank for Herrick & Tuttle, and the proceeds applied to their use; that Eastman and Powers were only accommodation par-

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But upon another trial it will be competent for the plaintiffs to show, if they can, that the relation between themselves and the intestate was really that of co-sureties, and that they were obliged to pay the note for their mutual benefit. Upon that question, the form of the note is not conclusive, and parol evidence is admissible. The plaintiffs would be allowed to show it, even if they had been promisors and the defendants' intestate an indorser. *Weston* v. *Chamberlin*, 7 Cush. 404. *Phillips* v. *Preston*, 5 How. 278. *Exceptions sustained.*

C. Allen, for the defendants.

D. W. Alvord & S. O. Lamb, for the plaintiffs, cited *Austin* v. *Boyd*, 24 Pick. 64; *Riley* v. *Gerrish*, 9 Cush. 104; *Chaffee* v. *Jones*, 19 Pick. 260; *Pitkin* v. *Flanagan*, 23 Verm. 160; *Moore* v. *Cross*, 19 N. Y. 227.

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ties to the note; and that when the note became due, Powers paid the amount of it to the bank, erased his name, and commenced this suit thereon.

The plaintiff requested the court to instruct the jury "that where a note is made to be discounted at a bank for the benefit of the signer, with the name of the payee and of another person on the back, and both the payee and other person are merely accommodation parties for the signer, the order of time in which the names of the parties are put to the note is immaterial, and the obligation of the several parties is to be determined by the instrument as it appears when finished and offered at the bank for discount, in the absence of any agreement between the parties varying that obligation."

The court refused to give these instructions, and instructed the jury "that if they were satisfied that it was the mutual agreement and understanding of all the parties to this note that it should be made in the form it bears, to be delivered to the bank for the purpose of paying a note on which they were all liable, and that each party to the note should be liable to the bank and to each other, in the order in which their names appear on the note, then their verdict should be for the plaintiff; but if they were not satisfied that such was the mutual agreement and understanding of the parties, nor what that agreement as to their respective liabilities on the note, if any, was, when they signed it, and if they were satisfied that the plaintiff placed his name on the note, after it was signed by the makers, and before it came to the hands of the defendant (the payee) and before the defendant put his name upon it, then the plaintiff stood as an original promisor in relation to this note, and could not recover in this action."

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions, which were *Sustained by this court.*

D. S. Richardson & G. F. Richardson, for the plaintiff.

W P. Webster, for the defendant.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF HAMPDEN, SEPTEMBER TERM 1859, AT SPRINGFIELD.

PRESENT.

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. GEORGE T. BIGELOW,
HON. EBENEZER R. HOAR,
} JUSTICES.

ROSWELL C. PECK *vs.* JAMES A. REQUA.

The resignation of an office in a corporation is a sufficient consideration for a promissory note, although the maker of the note has previously agreed, for a valuable consideration, to resign the office on demand of the payee.

ACTION OF CONTRACT on a promissory note. Answer, want of consideration. Trial and verdict for the defendant before *Bigelow*, J., to whose instructions the plaintiff alleged exceptions, the substance of which is stated in the opinion.

F. Chamberlin, for the plaintiff.

E. W. Bond, for the defendant, cited *Parish* v. *Stone*, 14 Pick. 198.

BIGELOW, J. On the verdict found by the jury in this case,

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it must now be taken as true, that the note declared on was given by the defendant to the plaintiff, in consideration that the latter, at the request of the former, resigned the office of president of the Nattatuck Bank, a corporation established by the laws of the State of Connecticut; that the plaintiff had previously, when elected to the office, agreed, for a valuable consideration, to resign the office without compensation, if the defendant should request him to do so; and that he refused to fulfil this agreement, unless the defendant would give him the note on which he seeks to recover in this action.

On these facts, the defendant contends that the note was without consideration. His argument is briefly this: The plaintiff was bound by his agreement to resign the office; and as the note was given solely to induce him to do that which he had already agreed to do, it is without consideration.

This at first sight seems plausible, but on more careful consideration we are satisfied it is not sound. The fallacy consists in assuming that the original agreement for the resignation of the office was the only consideration of the note. But the case shows that the plaintiff refused to fulfil this contract. He may have found that his private interest or his duty to others required him to continue in the office, and to incur the legal consequences of a breach of his contract with the defendant. On his refusal to resign, what was then the relative condition of the parties? The plaintiff still held the office, but he was liable to the defendant for a breach of his agreement. The defendant could not displace him, or in any way compel the immediate performance of the agreement. He had only his remedy against the plaintiff for the breach. But he did not see fit to resort to this. Probably it would not have answered his purpose, which seems to have been to procure the plaintiff to vacate the office immediately. To accomplish this, he entered into a new agreement with the plaintiff. Previously he had only the plaintiff's agreement to resign. By the new contract he obtained from the plaintiff his actual resignation, and in consideration thereof he gave the note in suit. By the surrender of an office which he had a right to retain, the plaintiff suffered a detriment, and the

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defendant thereby gained an advantage which furnished a valid consideration for the note.

The case falls within the principle that where there is a subsisting executory contract between parties, which one of them refuses to perform, and thereupon a new contract is entered into for the performance of the same matter, the latter, when executed, constitutes a good consideration for a promise. In such cases, the old contract is held to be waived or abandoned, or the parties are left to their legal rights and remedies for its breach; but it does not operate to make the new agreement invalid for the want of consideration. *Munroe* v. *Perkins*, 9 Pick. 298.

Exceptions sustained.

QUARTUS SEARLE *vs.* JOHN S. ABBE.

An action for trespass on land was referred, by rule of court, "with full authority to examine and establish boundary lines between the parties, about which there is any dispute, controversy or doubt;" and an award, giving damages and costs to the plaintiff, and establishing a boundary line by courses and monuments, was accepted by the court, and judgment entered thereon, notwithstanding the plaintiff's objection to so much of it as established a boundary, upon the ground that that provision was inserted in the submission by mistake and without his consent, and was protested against by him as soon as he discovered it. *Held*, that the boundary line so established was conclusive upon the parties in a subsequent similar action.

ACTION OF TORT against Abbe for a trespass on Searle's land. At the trial, Searle offered in evidence the record of the court of common pleas of a similar action brought against him by Abbe, which set forth a reference by rule of court, pursuant to an agreement of the parties, to three referees, "with full authority to examine any and all boundary lines between the parties, about which there is any dispute, controversy or doubt, and to establish the same as fully as though they were included in the pending suit; the report of whom or a majority of whom to be made to this court as soon as may be, judgment thereon to be final:" Their award that Abbe recover certain damages and costs, and establishing a boundary line between the lands of the

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parties by courses and monuments: A subsequent motion of Abbe for "the acceptance of so much of the award of the referees as relates to the subject matter of the action, and for judgment for the damages and costs which were awarded by the referees," and "to reject and set aside so much of the award as proposes to establish lines between real estate of the parties, because, 1st. No such matter was referred to the referees by any order of the court, nor could it be so referred in this action; 2d. Because so much of the rule delivered to the referees and returned by them, as purports to authorize them to establish boundaries between the parties, was inserted in said rule by mistake and without the consent of the plaintiff; and that as soon as it came to the knowledge of the plaintiff he protested against the exercise of any such authority, and refused to assent to any action of the referees in relation thereto: The overruling of this motion by the presiding judge for these reasons: "1st. Because of a doubt how far parol testimony is admissible to control the terms of the rule; 2d. Because, while upon the parol testimony I am satisfied that the plaintiff never intended or consented to submit anything more than the subject matter of the suit, I am equally satisfied that the defendant would not have consented to the reference unless he supposed that all matters named in said rule were to be submitted:" The acceptance of the award by the court on the motion of Searle, and judgment thereon for the damages and costs awarded.

Abbe admitted that if the line described in that record was conclusive, the trespass alleged in this action was within the plaintiff's line; but objected to the record as evidence of any boundary of his land, for the reasons stated in the record in support of his motion to reject that part of the award; and in support of this objection introduced several witnesses.

Abbe also contended that the action of the referees, in undertaking to establish this line, was an excess of authority on their part, because the rule only authorized them to determine and establish such boundaries as were in dispute or controversy; whereas there was in fact at that time no dispute or controversy in relation to this line; and offered evidence to prove this.

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But *Dewey*, J. proposed to rule "that if in fact the plaintiff did present the question of boundaries generally as between the parties, as a matter of dispute or doubt, upon which he asked the referees to arbitrate and adjudge, the question was, under the rule, properly before the referees;" and, by consent of parties, took the case from the jury, and reserved it for the full court upon the question whether the award of the referees was conclusive upon the defendant; the parties agreeing that if it was he should be defaulted; otherwise, a new trial should be ordered.

E. W. Bond, for the plaintiff.

G. Ashmun, for the defendant. An award upon a question of boundary can only operate by way of estoppel; it cannot change title. *Goodridge* v. *Dustin*, 5 Met. 367. In an action of trespass, there is no judgment as to title or boundaries, (although both may be incidentally involved in the preliminary stages of the case,) but only as to damages and costs. This record shows that the fixing of a boundary by the referees was without the defendant's consent and against his protest; so that here is no estoppel. Estoppels are not to be extended. 1 Greenl. Ev. § 22. The record would in any case be only *prima facie* evidence that a line had been established by agreement of parties. The record of the line is no part of the judgment. The order of the court, accepting the award, only accepts so much as is necessary to the judgment, to wit, the finding as to damages and costs. The award would be just as binding if the judgment should be reversed on error.

METCALF, J. It is perfectly clear that the defendant cannot be permitted, in this action, to show, contrary to the record in the action formerly brought by him against the plaintiff, that he did not consent to the submission of that action to arbitrators, with authority to them to establish the boundary lines between his land and that of the plaintiff, which lines were in controversy or doubt. The defendant's proper course was, to move to discharge the submission, if it was found by him to be contrary to his understanding or consent. The judgment that was rendered in that action is conclusive, until it shall be reversed on error, or

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adjudged to be void by reason of fraud in obtaining it, or for other legal cause.

Taking that judgment to be valid, this case is decided by that of *Goodridge* v. *Dustin*, 5 Met. 363, in which it was held, that on a submission to arbitration, in a form like that entered into in the first case by these parties, the award made by the referees, and accepted by the court, was conclusive as to the boundaries between the lands of the parties. Not that land can be transferred by an award and judgment thereon; but that the parties to the submission are thereby estopped to dispute the title or boundary which is distinctly settled by the award. The arbitrators, in this case, did not make new boundaries, nor change old ones; they merely found where the preëxisting boundaries were. As was said by James Otis *arguendo*, and affirmed by the decision of the superior court of judicature of the Province of Massachusetts Bay, almost one hundred years ago, in a case in which arbitrators had determined a boundary line, without ordering a release of the land on either side, "I grant the award to be void if the arbitrators have determined the freehold; but here they have not, they have only determined the line; the settling that does not affect the freehold." *Rogers* v. *Kenwrick*, Quincy, 63, 64. See also *Clark* v. *Burt*, 4 Cush. 396; *Calhoun's Lessee* v. *Dunning*, 4 Dall. 120, 122; *Robertson* v. *M'Niel*, 12 Wend. 583; *Shelton* v. *Alcox*, 11 Conn. 240; *Doe* v. *Rosser*, 3 East, 16; *Thorpe* v. *Eyre*, 3 Nev. & Man. 218, and 1 Ad. & El. 932, by Patteson, J. *Defendant defaulted.*

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David A. Bodurtha *vs.* Cyrus Phelon.

In an action brought before a justice of the peace on a note given for the price of a horse, the defendant relied on a breach of warranty, and judgment was given for a portion of the note, from which the plaintiff appealed to the court of common pleas, and the defendant was there defaulted. *Held*, that the former judgment was no bar to an action on the warranty.

Action of tort for deceitful representations of the soundness of a colt sold by Phelon to Bodurtha for seventy dollars.

The answer denied the representations and the unsoundness, and alleged that Bodurtha had sued the plaintiff before a justice of the peace on the note given for the price of the colt; that upon the trial before said justice Bodurtha appeared and answered orally, and was examined as a witness, and introduced evidence of the unsoundness of the colt, and of Phelon's deceit, to show that the consideration of the note had failed; that said justice deducted forty dollars for the defects of the colt and breach of warranty, and gave judgment for thirty dollars and costs, from which Phelon appealed to the court of common pleas, and in that court Bodurtha was defaulted; and that, after the trial of that action before said justice, this action was tried before another justice of the peace, upon the same cause of action which had been set up as a defence to that action, and the same facts were in evidence as at that trial, and judgment was rendered by the justice in this action in favor of Bodurtha for thirty dollars and costs, from which Phelon appealed to the court of common pleas.

The plaintiff filed a replication, alleging that on Bodurtha's default judgment was rendered against him for the full amount of Phelon's claim, and that the facts in evidence at the two trials before the justices of the peace were different; and admitting, in substance, the other facts alleged in the answer.

Upon these pleadings the court of common pleas gave judgment for Phelon, and Bodurtha appealed.

E. B. Gillett & H. Fuller, for the plaintiff.

M B. Whitney, for the defendant.

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METCALF, J. The plaintiff could not maintain this action, if the judgment recovered against him on his note given to the defendant for the price of the colt were now in force. He would have received, in the deduction of forty dollars from the amount of that note, his damages for the deception practised on him by the defendant in the sale of the colt, and have been thereby barred from any further remedy for that deception. *Burnett* v. *Smith*, 4 Gray, 50. But that judgment was vacated by the defendant's appeal therefrom to the court of common pleas; and upon the entry of that appeal in that court, the present plaintiff withdrew his defence and was defaulted. Thereupon judgment was rendered against him for the full amount of the note, and he was left at liberty to prosecute this action. 1 Chit. Pl. (6th Amer. ed.) 243.

As the court of common pleas entered judgment in this case for the defendant, that judgment is reversed and the case is to be sent to the superior court for trial.

PAUL DEWING & others *vs.* CONGREGATIONAL SOCIETY OF THE NORTH PARISH OF WILBRAHAM.

The proprietors of a church made a contract in writing with a master builder to rebuild the church for a gross sum, "the contractor to perform all labor and to furnish all the materials." *Held*, that workmen employed by the contractor to work upon the building, or at the contractor's shop for the building, were entitled to a lien upon the building, under *St.* 1855, *c.* 431.

Other workmen, summoned in pending a petition to enforce a mechanic's lien, have the same rights as if they had filed separate petitions at the same time as this one.

PAUL DEWING on the 24th of March 1857 inserted in a writ returnable to the police court of Springfield, according to *St.* 1855, *c.* 431, § 5, a petition to enforce a lien upon a meeting house and land in Wilbraham, for labor performed from the 22d of December 1856 to the 7th of January 1857.

After the entry of this petition an order of notice was issued to other persons claiming like liens, and they came in and filed

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similar petitions on the 26th of May 1857, claiming liens for work which ceased in January or February 1857.

The police court gave judgment for the petitioners, and the respondents appealed to the court of common pleas, where the whole matter was referred to an auditor, who reported the amount due to each petitioner, and the case was submitted to the decision of that court upon a statement of facts, which stated the dates of the proceedings, and the residue of which was as follows:

"The respondents are the owners of the property upon which it is sought to enforce the lien. The church was rebuilt in 1856–7, by the society, and they by their committee made a written contract with William G. Emerson, a master builder, to rebuild the same for a gross sum, 'the contractor to perform all labor, of whatever kind required, and to furnish all the materials, of whatever name or kind, to complete the building finally and fully according to the true and evident meaning of the foregoing stipulations and the accompanying plans.' Said Emerson employed Paul Dewing and the other petitioners to work either upon the church building in Wilbraham or upon work for the church at Emerson's shop in Springfield; said Emerson paying them therefor as he saw fit and they and he agreed. No contract was made between the respondents and either of the petitioners personally for any labor or sum. Each of the petitioners recorded his claim within thirty days after ceasing to labor. The amount due each for his labor and service is agreed to be the amount respectively found for each by the auditor."

Mellen, C. J. gave judgment for the respondents, and the petitioners appealed.

F. Chamberlin, for the petitioners.

W. L. Burt, for the respondents.

METCALF, J. We cannot distinguish this case from that of *Parker* v. *Bell*, 7 Gray, 429.

Those who had claims that were seasonably recorded, and that were not barred at the time when Dewing's petition was entered, were rightly summoned in, and have the same remedies as if each of them had seasonably filed his separate petition.

Judgment for the petitioners

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REUBEN A. CHAPMAN & others *vs.* JOSIAH WILLIAMS & Trustee

The grantee of real estate conveyed without adequate consideration cannot be charged as the trustee in foreign attachment of the grantor.

Under the *St.* of 1857, *c.* 249, a note made payable to a married woman is exempt from attachment by subsequent creditors of her husband.

TRUSTEE PROCESS, commenced on the 28th of March 1858. Warren Fuller, summoned as trustee of Josiah Williams, disclosed in his answers as follows:

"In January 1852 Williams conveyed to me a farm in Monson, worth from six to eight thousand dollars. The consideration expressed in the deed was ten thousand dollars. There was a mortgage upon it for three thousand dollars, besides interest. In consideration of his wife's joining in this deed, I paid her five hundred dollars, and gave to her, into her own hands, a note for two thousand five hundred dollars. I do not know what were Williams's reasons for making the conveyance; and I have no recollection of receiving any directions from him as to how the note should be made payable; but I told Mrs. Williams that I would pay the amount whenever she should procure a divorce from her husband. I have since paid seven or eight hundred dollars upon the note, and have paid debts of Williams to the amount of several hundred dollars. I consider that I have paid and am liable to pay more than the full value of the farm at the time of the conveyance."

Mrs. Williams testified that she received the note from Fuller at the time above mentioned, and that it was made payable to her, not to her order or to bearer; that "the condition of said note was, in substance, that it should be paid to her whenever she did procure a divorce from said Williams;" and that the note was not now in her possession, but in the possession of another person, whom she named.

R. A. Chapman, for the plaintiffs.

E. W. Bond, for the trustee.

DEWEY, J. So far as the plaintiffs seek to charge the sup-

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posed trustee by reason of his holding any real estate acquired by a conveyance from the debtor without adequate consideration therefor, or as not having paid for the same what it was really worth, this process has, by repeated decisions of this court, been held to be ineffectual. *Ripley* v. *Severance*, 6 Pick. 474. *Gore* v. *Clisby*, 8 Pick. 555. *Bissell* v. *Strong*, 9 Pick. 562. If such sale is to be avoided, it must be by a levy by the creditor on the land itself. It is not open to a creditor to hold the purchaser of such real estate to account for the actual value of the estate, in contradistinction to the price agreed upon by the parties, or the sum actually paid for the same. Hence all questions of value of the land are withdrawn from the case, in the inquiry under the trustee process. The single question is, whether the person sought to be charged as trustee has paid to the grantor the sum stipulated to be paid, or whether there is any indebtedness to the vendor from the vendee under the stipulations of the contract as made by them.

This sale, as stated in the answers of the trustee, was upon an agreement by the vendor to pay in cash the sum of five hundred dollars, which was done, and the giving of a note for two thousand five hundred dollars to the wife of the grantor, the estate being then under a mortgage for three thousand dollars. There is nothing to show that the purchaser was to pay any other or further sums than these as the consideration for the conveyance. The consideration stated in the deed is ten thousand dollars, but this is accompanied with the recital that the same is fully paid and satisfied. These recitals are to be controlled by the evidence of the real consideration, and also of the fact of payment, and are not therefore material in the present case.

The only real question here is that of the liability of the trustee to be charged in the action by reason of his indebtedness on the two thousand five hundred dollar note. This note was given to the wife of the grantor, and was made payable to her. The maker testifies that he was to pay it upon a certain condition; but it does not appear that any condition was stated in the note We assume it to be an absolute note payable to the wife

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of the grantor. The further inquiry is, whether this note was her separate estate. As to this, it appears that the note was made at the time of the execution of the deed, and then delivered to her in consideration of her joining in the deed with her husband and releasing all her rights in the land conveyed. This note was delivered to her, and the possession of the same has been retained by her, without any interference by her husband, or any claim set up by preëxisting creditors of her husband. It is now sought to be reached by subsequent creditors of her husband. It was formerly decided that the husband might, through the agency of a trustee, have placed this sum in his hands for the benefit of the wife. By our earlier decisions such a note to the wife, or any legacy or pecuniary gift to the wife, might have been the subject of a trustee process by a creditor of the husband. Those decisions were not in perfect harmony with the doctrines of the right of survivorship of the wife in all her choses in action which the husband did not choose to reduce to possession and thus change the character of. By the recent *St.* of 1857, *c.* 249, the separate property of the wife is directly exempted from attachment by the creditors of her husband. This being so, in the opinion of the court this note was not the subject of the trustee process in favor of the plaintiffs.

Trustee discharged.

LUCRETIA G. CHASE & another, Administrators, *vs.* APOLLOS REDDING & others.

A gift of negotiable promissory notes, secured by mortgages of real estate, with proper assignments of the mortgages to the donee, made during the last illness of the donor, who is aware of his condition, and intends the gift as a final disposition of the property, is a good *donatio mortis causa*.

A *donatio mortis causa* will not affect the rights of creditors of the donor.

An administrator, who has admitted claims made against the estate of his intestate before they were barred by the special statute of limitations, and agreed with such creditors to bring a suit for their benefit to recover back a gift *causa mortis* of the intestate, may bring such suit after the expiration of such period of limitation.

In a suit in equity by an administrator to recover, for the benefit of creditors, the subject

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of a *donatio mortis causa*, the defendant, if he has not offered, in his answer, to pay the debts, but has denied that the suit can be maintained against him, will not be exonerated from the payment of costs and expenses of administration.

SHAW, C. J. This is a bill in equity, brought by the plaintiffs as administrators of the estate of George W. Chase, deceased, against Apollos Redding and others, seeking to have certain assignments and transfers of property, made by their intestate prior to his decease, set aside, and the property restored to the plaintiffs, to be administered as the assets of the said estate, and for other relief.

The case was, by mutual consent, referred to Henry Vose, Esq., who has made a report of the facts, which the parties, by their certificate in writing, have agreed shall be taken as the facts of the case. It will be sufficient therefore to take an abstract of Mr. Vose's report, as a statement of the case, on which the questions before us arise.

It appears that George W. Chase, the plaintiffs' intestate, died, leaving no issue, but leaving a widow, now one of the plaintiffs. He had formerly been the owner of a farm, which he had sold to William B. Taber, his wife's brother, and received three notes of $1,000 each, secured by mortgage. Prior to May 1852, domestic troubles and difficulties subsisted between said Chase and his wife, and there were mutual complaints and great want of harmony between them; they partially separated in May 1852, and in the latter part of the summer of that year he left the neighborhood and probably the State, and she never saw him after the 1st of September 1852.

Chase, the intestate, returned to Massachusetts in 1855, and went to reside in Ware with Apollos Redding, one of the defendants, who had married his sister; he was then laboring under a disease which his physician advised him was incurable, as it proved, and he died in October 1855. During his sickness, upon deliberation and under advice of counsel, he gave to Apollos Redding, to a niece, daughter of said Redding, who had assiduously attended him, and to a young man whom he had formerly partially adopted, the three notes, secured by mortgage, for $1,000 each, being the whole of his available

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property, and proper assignments to secure payment of said sums to the respective donees. These were intended by said Chase as gifts *causa mortis*. It appears that this was nearly, if not quite, the whole of his property, and no assets of any importance came to the administrators.

On reference to Mr. Vose, public notice was given to any persons, having claims against the estate of said Chase, to come in and prove them; and the claims of various persons, specifically enumerated, were proved, amounting in the aggregate to between $400 and $500.

The court are of opinion, upon the case shown, that the gift of the three negotiable notes to the donees respectively, with an assignment of mortgages to secure them, was a good *donatio mortis causa*. It was accompanied with all the incidents required to give legal effect to such a gift. The donor was in his last sickness, and so considered himself, and intended to make a final disposition of the property, in case he should not recover.

As to the character of the thing given, the law has undergone some changes. Originally it was limited, with some exactness, to chattels, to some object of value deliverable by the hand; then extended to securities transferable solely by delivery, as bank notes, lottery tickets, notes payable to bearer, or to order, and indorsed in blank; subsequently it has been extended to bonds and other choses in action in writing, or represented by a certificate, where the entire equitable interest is assigned; and in the very latest cases on the subject in this commonwealth it has been held, that a note not negotiable, or if negotiable, not actually indorsed, but delivered, passes, with a right to use the name of the administrator of the promisee, to collect it for the donee's own use. *Sessions* v. *Moseley*, 4 Cush. 87. *Bates* v. *Kempton*, 7 Gray, 382. For the general principle we refer to 2 Kent Com. (6th ed.) 444; *Parish* v. *Stone*, 14 Pick. 203.

But we think it is equally clear that such a gift cannot avail against creditors. Their right is prior in character. A man is bound to be just before he is generous. Creditors have claims on the justice and legal duty of the debtor; whilst donees, lega-

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tees and heirs, having paid nothing, are volunteers, and have claims only on his bounty. Strictly speaking, the only property which any one can give away, voluntarily dispose of without consideration, is the balance which remains after payment of his debts.

But it is objected to this suit, that before it was commenced the two years had expired within which, under the *St.* of 1852, *c.* 294, the creditors could bring suits against the administrators for their debts. But it does not follow that this suit cannot be brought to get in the assets. They made their claims before the statute bar had run against them, and the administrator admitted them; Mr. Bond, one of the administrators, promised to bring this suit as their trustee and for their benefit, and to take no advantage of the statute of limitations.

We may ask, What would have been the legal course, if this arrangement had not been entered into? Each would have brought his action, and to each the administrator might have pleaded *plene administravit*, and each would have been entitled to the common law conditional judgment against the assets when they should accrue — *quando acciderint.*

Or suppose no such plea had been made, and the creditors had had a general judgment *de bonis testatoris;* or suppose the estate had been represented insolvent, and the claims of these creditors had been rejected by commissioners; in either of those cases, it would be the right and the duty of the administrator to proceed and get in the assets as soon as he could, notwithstanding the lapse of two years; and in this way these would have been legally available for the payment of these debts. In such case, we think it was competent for the parties, in order to avoid the unnecessary expense of suits, to accomplish the same purpose by the arrangement actually made. It was not injurious to the defendants, and it is opposed by no bar to a suit against them. Suppose this suit had been brought within two years, under a like arrangement, and pending the suit the two years had expired, would that bar or abate the suit? We think not. The administrator is trustee for creditors, and in that

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capacity may avail himself of legal means to get in the trust fund. This objection cannot avail the defendants.

These gifts, if confirmed and held good, do not impair the rights of the widow. Her right is to the property of which the husband died seised or possessed. These gifts have their full effect in the lifetime of the donor, and the property is not in his possession at the time of his decease, and does not come under the administration of the executor. *Parish* v. *Stone*, 14 Pick. 203.

But we think that the defendants, not having, by their answer, offered to pay such debts as might be found due from said Chase, but on the contrary denied that this suit can be maintained for their benefit, cannot exonerate themselves from the payment of the costs in the present suit, with the expenses of administration.

But as the defendants have now offered to pay the debts due to creditors of the estate, and as a reference has already been made to a master, who has reported specifically every debt, and the name of each creditor, and all others are now barred by the statute of limitations, a special decree may be entered to this effect: That if the defendants will proceed and pay to all such creditors the debts reported to be due to them respectively, and produce evidence thereof or of a sufficient tender; also all such reasonable allowance for expenses of administration and costs of this suit, as this court may hereafter allow of and approve; then all further proceedings in this suit shall be stayed, without further costs to either party. In the mean time this case to be continued to the next term of the supreme judicial court for this county, to enable the defendants to comply with the foregoing condition. *Decree accordingly*

A. L. Soule, for the plaintiffs.

N. A. Leonard, for the defendants.

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Charles Phelps *vs.* Homer Foot, Trustee, & others.

Three tenants in common of a hotel and the furniture therein signed a "proposed division" thereof, which set out, by metes and bounds, three parcels into which the real estate was to be divided, and specified the conditions as to occupancy, and the easements and appurtenances belonging to each parcel, and further provided that, "the division being completed, the parties agree, each with the other, to exchange title deeds with warranty, and to secure the payment of cash equivalents that may represent the differences in value of the several divisions;" appended to which were a schedule of the rents of the different parts of the estate for the two years next preceding, with these words, signed by the parties, "the only question to be determined by the appraisers is the true and relative value of each part after the division;" and a report of the appraisers. The parties also agreed orally that their several liabilities under the mortgage upon the estate should be so apportioned among themselves, that each should pay such proportion thereof as the appraised value of the lot to be conveyed to him should bear to the appraised value of the whole estate; and afterwards agreed that the first choice of lots should belong to him who would offer the highest sum for it; and he who offered the highest sum made a promissory note therefor to the other two, and selected a lot, and, with the consent of the others, took possession of it as the part which he was to have upon the division, made upon it the alterations which the conditions of the division required, leased it in his own name, and was afterwards recognized in various ways by the survivor of the two others, as entitled to hold and enjoy that parcel in severalty. But in the mean time, and before any agreement as to which of the others should take either of the remaining parcels, or arrangement for the division of their liability under the mortgage, or execution of any deeds of partition, one of the other two had died. *Held*, that the division had not been completed before his death, and could not now be completed according to the intention of the parties, and that equity therefore would not decree a conveyance of the lot, so selected, to him who had selected it.

Bill in equity by Phelps against Foot as trustee of Lucy G. Orne, and against the administrator, widow and children of John Childe, to compel the specific performance of an agreement between Phelps, Foot and Childe, for the division of the hotel and estate in Springfield, known as the Union House Property, and of the furniture therein. The case was heard before *Dewey*, J., upon the bill, answer, replication and proofs, and by him reported to the full court.

G. Ashmun & N. A. Leonard, for the plaintiff.

R. A. Chapman & G. Walker, for the defendants.

Hoar, J. There are several questions of interest and importance in this cause, which have been ably argued by counsel, which we do not now decide, because there is one view of the

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case, which is conclusive upon its merits as presented by the bill.

The bill seeks to enforce the specific performance of a contract for the partition of real estate. As the foundation of the right which the court are asked to establish by their decree, it is obvious that the plaintiff must show that such a contract was made. If the whole evidence upon which he relies, supposing all of it to be competent, would not be sufficient to prove such a contract, complete and capable of execution, it would be a fruitless application of labor to consider the effect of the statute of frauds upon the evidence, or the obstacles which have been suggested to the granting of the particular relief desired. There must be a right, before the questions affecting the remedy can assume practical importance. We have therefore examined the whole evidence carefully, to determine whether, if Childe were still living, and everything which the parties to the transaction have done were proved by writings under their hands, we could find that a complete contract, such as the plaintiff seeks to enforce, was ever made and concluded between them.

The paper relied upon by the plaintiff is entitled, "Proposed Division of Union House Property." It proceeds to set out three parcels into which the real estate is to be divided, by metes and bounds, and to determine the conditions as to occupancy, and the easements and appurtenances belonging to each of the three. It then provides as follows: "5th. The division being completed, the parties agree, each with the others, to exchange title deeds with warranty; to secure the payment of cash equivalents, that may represent the difference in value of the several divisions," &c.

There was added in pencil, at some distance down the paper, a schedule of the rents of the different parts of the estate for the two years next preceding, with these words: "The only question to be determined by the appraisers is the true and relative value of each part after division," with the signatures of Childe, Phelps, and Foot, trustee, also in pencil.

The three appraisers referred to appraised the several parcels, and made a written report of their appraisal.

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It is further alleged in the bill, that the whole estate was subject to a mortgage to the Springfield Institution for Savings, for the sum of eight thousand and three hundred dollars; and that the parties agreed that their several liabilities under said mortgage should be so equated and apportioned among themselves, that Phelps should be bound to pay such proportion thereof as the appraised value of the lot to be conveyed to him should bear to the appraised value of the whole estate. It appears by the evidence that, after the division of the property into the three parcels, it was agreed by the parties that the first choice of lots should belong to him who would offer the highest sum for it; that Phelps offered five hundred dollars, (which was more than either of the others would give,) and that he made a promissory note for that sum, which he delivered to Childe and Foot; that thereupon he selected lot No. 1, and, with the consent of the others, took possession of that part of the estate as the part which he was to have upon the division, made the alterations upon it, which the conditions of the division required, leased it in his own name, and was afterwards recognized in various ways by Foot, as rightfully in possession, and entitled to hold and enjoy that parcel in severalty.

But in the mean time, and before any agreement as to which of the others should take either of the remaining parcels, or arrangement for the division of the liability under the mortgage, and before any deeds of partition were executed, Childe had died; and the plaintiff thereupon claims that he is entitled to have the agreement executed so far as he is concerned, by a release to him of the parcel which he had selected, leaving Foot and the heirs of Childe to hold the other two parcels in common, and to bear jointly the responsibilities which may attach to them.

We do not think that this is consistent with the true construction of the agreement, or comes within the intention of the contracting parties. That agreement contemplated a division of the estate between the three, not the setting off of a portion to one, and leaving the rest to be held undivided by the other two. The title deeds were to be exchanged, "the division being

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completed;" and it was not completed by setting off one parcel to Phelps. The assignment of that parcel to him was but the first step toward its completion, and was made in the belief and upon the supposition that it would be afterward completed, by the assignment of a separate parcel to each of the others, in some manner to be subsequently determined. The death of Childe made such a completion impracticable, unless the heirs of Childe chose to come to an agreement with Foot. The subsequent acts of Foot seem to have been done with the expectation that the contract would be carried out, and that he and the heirs of Childe would agree which parcel of the two remaining should be taken by them respectively. But the court cannot now decide which of the lots, No. 2 and No. 3, either of the defendants shall be compelled to take; nor is there any mode in which we can compel them to agree. Until this is decided, it is impossible to determine what proportion of the mortgage Foot should pay or assume, or whether he should pay or receive a sum of money to equalize the partition. We think the whole contract with Phelps was contingent and prospective, and made in reference to the further division which the death of Childe has interrupted. His claim cannot therefore be supported.

The amendment to the bill, which seeks for a division of the personal property, must also fail, because that division was made to depend wholly upon a previous partition of the real estate. *Bill dismissed.*

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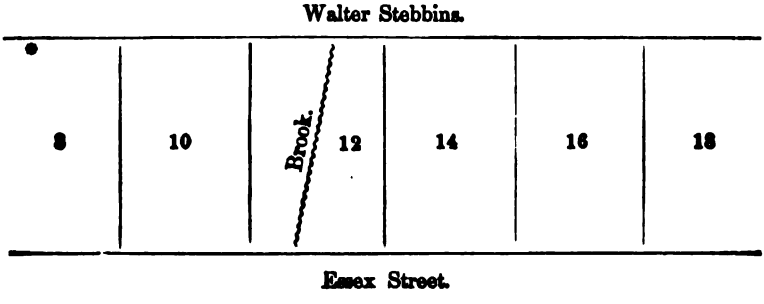
James Beahan *vs.* Richard Stapleton.

A deed described the land conveyed as "laid out into building lots, and described on a plan, recorded," &c. "and numbered lots 12, 14, 16," &c., and as bounded "westerly by lot 10, or my own land by the middle of the brook between lots 10 and 12." The grantee on the same day made a mortgage back to the grantor of land bounded "westerly by the brook, and is the same land this day conveyed to me by said" grantor. The brook ran through lot 12 from north to south. *Held*, that the deed conveyed the land as far as the brook only.

Action of tort for breaking and entering the plaintiff's close, and removing a fence. Answer, soil and freehold in the defendant. The parties submitted the case upon the following statement of facts:

"On the first day of May 1848, George Stebbins was the owner of the several lots of land in Springfield, bounded northerly by land of Walter Stebbins, easterly by Chestnut Street, southerly by Essex Street, and westerly by lot No. 8, belonging to Jerry Whalen. The said lots had then been laid out and described on a plan recorded in the Hampden County Registry of Deeds, and numbered lots 10, 12, 14, 16, &c., a copy of which plan is hereunto annexed and made part of this case," and so much of which as is important to the understanding of the case is copied in the margin.*

"On said first day of May 1858, Stebbins conveyed to Rufus Dane, 'a tract of land bounded southerly by Essex Street, easterly by Chestnut Street, northerly by land of Walter Stebbins, westerly by lot No. 10, or my own land by the middle of



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the brook between lots Nos. 10 and 12; the above piece of land being laid out into building lots, and described on a plan, recorded,' as aforesaid, 'and numbered lots 12, 14, 16,' &c. Said Dane, on the 23d of March 1849, executed a deed to the defendant of the whole of the lot numbered 12 on said plan.

"On the sixth of May 1848, Stebbins conveyed to E. M. Skinner 'a certain tract or parcel of land on the northerly side of Essex Street, bounded westerly by lot No. 8, sold to Jerry Whalen, and easterly by the middle of the brook by land sold to Rufus Dane, being lot No. 10 and part of lot No. 12, as marked on my plan.' And Skinner conveyed the lot last above described to Nelson Sherburn, who conveyed the same to the plaintiff.

"All the deeds and conveyances above mentioned were duly recorded in the registry of deeds for said county, in the order in which they were made.

"The fence mentioned in the declaration, removed by the defendant, was erected by the plaintiff a short time before the commencement of this suit, and stood on the centre of the said brook, according to its course at the time said deeds were made, and within the limits of lot No. 12, as indicated on said plan.

"Should the court be of opinion that the division line of the said parties between their said lots is the centre of the brook above named, according to its course on or about the 1st of May 1848, judgment shall be entered for the plaintiff in the sum of one dollar; otherwise, the plaintiff shall become nonsuit."

Upon the production, at the argument, of the book of deeds recorded in the registry, it appeared that on said 1st of May 1848 Dane made a mortgage back to Stebbins, (which was duly recorded,) with this description: "A tract of land situate in Springfield, and bounded southerly by Cedar Street, easterly by Chestnut Street, northerly by land of Walter Stebbins, and westerly by the brook, and is the same land this day conveyed to me by said Stebbins." At the suggestion of the court this mortgage was made a part of the statement of facts.

J. M. Stebbins, for the plaintiff.

E. W. Bond, for the defendant.

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DEWEY, J. The question raised here is as to the proper construction of the boundaries in the deed from George Stebbins to Rufus Dane. As to one of those boundaries, the deed wants precision and certainty. There is obviously a misrecital. All the descriptions cannot stand, and one of them must be rejected as a false demonstration. The boundary "by the middle of the brook" is a more controlling one in its general character, and must necessarily have peculiar prominence, in fixing the meaning of the parties as to the western boundary of the lot conveyed.

But the case does not turn upon this fact alone, the construction giving effect to the recital of the brook, as the intended controlling monument, being much strengthened by recurring to another instrument executed on the same day by the parties, and as a part of the same transaction. In the mortgage given by Dane to Stebbins to secure the purchase money, and executed at the same time, after giving the other boundaries as in the deed from Stebbins to Dane, the western boundary is thus described, "westerly by the brook, and is the same land this day conveyed to me by said Stebbins." This latter deed is clear and explicit, in giving the brook as the western boundary. It also declares that the land thus described in the mortgage deed is the same land this day conveyed to Dane by Stebbins. It is an acknowledgment in terms by Dane that the land conveyed to him by Stebbins was bounded westerly by the brook.

Judgment for the plaintiff.

WILLIAM BARTLETT *vs.* ALFRED BLANCHARD & others.

The measure of damages for the breach of a contract to sell and deliver goods at a certain time is the value of the goods at that time, deducting the contract price; and no further damages can be recovered, if it does not appear that the use to which they were to be applied was known to the seller.

HOAR, J. The plaintiff sues upon the account annexed to his declaration, to recover the price of certain timber sold by

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him to the defendants. The defendants answer that by a special contract the timber was to have been delivered in the autumn of 1853, and that it was not delivered till January 1854; and offer to show, in mitigation of damages, that they had employed a number of men to build a vessel from the timber to be delivered, and that, from the failure of the plaintiff to perform his contract, these men were obliged to remain idle for a considerable time, and afterward to work at a more expensive rate; that, by reason of the coldness of the weather and the shortness of the days, it cost more to build the vessel at the season when the timber was delivered and the vessel was built, than at the time when it was agreed to be delivered; that the cost of unloading the vessels in which the timber was delivered was greater than it would have been at an earlier season, and that some of it was actually lost. The presiding judge, at the trial in the court of common pleas, excluded the evidence, and we are of opinion that his decision was correct.

The ordinary measure of damages for breach of a contract to sell and deliver goods is the value of the goods at the time at which it was agreed that they should be delivered, deducting whatever may not have been paid of the contract price. This is the established rule in this commonwealth. *Shaw* v. *Nudd*, 8 Pick. 9. To support any further claim for damages, it must appear that some other element of damage was included in the nature or terms of the contract. *Batchelder* v. *Sturgis*, 3 Cush. 204. All the cases upon which the defendants' counsel relies are cases where the particular purpose for which the goods were to be furnished appeared by the contract, and constituted a part of the intention of the parties in making it. But by the exceptions, or the pleadings, in this case, it does not appear that the contract was to deliver the timber at any specific place, or for any specific purpose. It does not even appear that it was agreed to be delivered from vessels, or from wagons. There is nothing to show that any peculiar use to which the defendants might wish to apply it was ever in the contemplation of the plaintiff. The defendants could make such use of the timber when they had it, as they pleased. There is nothing to show

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that it was expedient for them to build the vessel with it when it was delivered. The use which they made of it appears to have been a matter of their own choice, with which the plaintiff had no concern or connection. *Exceptions overruled.*

F. Chamberlin, for the defendants, cited *Griffin* v. *Colver*, 16 N. Y. 489; *Dubois* v. *Delaware & Hudson Canal*, 4 Wend. 285; *Masterton* v. *Brooklyn*, 7 Hill, 61; *McAfee* v. *Crofford*, 13 How. 447; *Hayward* v. *Leonard*, 7 Pick. 185; *Snow* v. *Ware*, 13 Met. 42; *Button* v. *Turner*, 6 N. H. 497; *Koon* v. *Greenman*, 7 Wend. 123; *Perley* v. *Balch*, 23 Pick. 286, 287; *White* v. *Moseley*, 8 Pick. 359; 1 Greenl. Ev. § 254; *Bartlett* v. *Greenleaf*, 11 Gray.

J. Wells, for the plaintiff.

ELIZA A. ORRELL *vs.* HAMPDEN FIRE INSURANCE COMPANY.

In an action upon a policy of insurance upon property which is admitted to have been owned by the plaintiff when the policy was issued, the burden of proof is upon the defendants to show a subsequent alienation of the property.

A mere agreement between the owner of property insured and another person, to represent to the creditors of the owner, in order to prevent attachments, that it had been sold to such other person, does not avoid the policy, although the policy is upon condition that the insurance shall be void "in case of any sale, transfer or change of title."

ACTION OF CONTRACT upon a policy of insurance upon the stock of goods in the plaintiff's shop in Holyoke.

Answer, 1st, that after the issuing of the policy, and before the loss, the plaintiff sold, transferred or changed the title in the property to Roswell P. Crafts, without notice to or consent of the defendants, and contrary to an express condition of the policy, that "in case of any sale, transfer or change of title in the property insured by this company, such insurance shall be void;" 2d, that at the time of the loss, the plaintiff was not the owner of the property, and had no insurable interest therein.

Trial before *Dewey*, J., who, after a verdict for the plaintiff, made a report thereof to the full court, the substance of which was as follows:

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"That the plaintiff was the owner of the goods at the date of the policy was not denied, but fully proved. The course of the trial was thus: the plaintiff proved her policy, the loss by fire, and a statement of her loss, and claim for the same, exhibited to the defendants, with a detailed statement thereof, and evidence tending to prove the value of the goods destroyed."

The defendants offered evidence tending to show that some weeks before the fire the plaintiff, in order to prevent the attachment of these goods by her creditors, said she had sold the property to Crafts, who was one of her creditors; and represented to her other creditors, before the fire, and to agents of the company after it, that the goods were not hers, but belonged to Crafts. The plaintiff and Crafts testified that there had been no bill of sale of the property given; but that once, when Crafts was in the shop, the plaintiff told him she wished to put the goods into his hands; and he looked over the goods, and told her, if any of her creditors came, to tell them the goods were his, and send them to him.

The defendants contended "that the burden was on the plaintiff to prove that the goods were hers at the time of the fire; and that even if there was no actual sale of the goods to Crafts, by which the property in them would pass to him, yet if there was an arrangement by which the goods were left in her hands under a fraudulent pretence of title in him, though it was merely colorable, such a transaction would avoid the policy."

But the court instructed the jury "that if they were satisfied that the plaintiff was the owner of the goods when the policy issued, and if the defendants sought to avoid the policy by reason of such alienation, the burden would be on the defendants to establish such alienation; that, to constitute such alienation, it must be such as to pass the legal title as between the parties to it; that it need not be such a sale as would be valid as against the creditors of the plaintiff; that a mere agreement of the parties to represent to creditors that there had been such sale, to protect the property from attachment, when in fact nothing had been done by way of a formal transfer of the property, would not constitute such alienation as would defeat the policy."

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R. A. Chapman, for the defendants. 1. The burden was on the plaintiff to prove her title at the time of the loss, and did not shift. Angell on Ins. § 193. *Delano* v. *Bartlett*, 6 Cush. 364. *Crowninshield* v. *Crowninshield*, 2 Gray, 524, and cases there cited.

2. If there was no alienation, there was an important change respecting the title, and one which would avoid the policy 1 Phil. Ins. §§ 534, 542. *Carroll* v. *Boston Marine Ins. Co.* 8 Mass. 515. *Dadmun Manuf. Co.* v. *Worcester Mutual Fire Ins. Co.* 11 Met. 429.

J. Wells, for the plaintiff.

Bigelow, J. 1. There can be no doubt, that in an action on a policy of insurance, the burden of proof is on the plaintiff to show that at the time of the loss he had an insurable interest in the property covered by the policy. This is a fact essential to the plaintiff's right of recovery, the proof of which lies on him in all stages of the case. 2 Greenl. Ev. §§ 376, 378. But in the present case it does not appear that the question of interest was seriously in dispute between the parties at the trial. Certainly no instruction was asked by the defendants on any matter which necessarily involved a ruling in regard to it.

The real question in contention was, whether the plaintiff had alienated or changed the title to the property, within the meaning of one of the conditions of insurance attached to the policy, and thereby rendered the contract void. This presented a very different issue from that raised by a denial of the plaintiff's insurable interest in the property, and would require very different evidence to sustain it. It would not have disproved an insurable interest in the plaintiff, to show that after the date of the policy she had transferred the goods, so that at the time of the fire she was only a mortgagor, having a right of redemption in the property, or that she had conveyed it, retaining in herself only a qualified right as pledgor or *cestui que trust*. Such a title would have been sufficient proof of interest in the plaintiff; but proof of these or similar facts would have been adequate and decisive evidence to show that she had changed the title of the property, and thereby violated a condition on which the

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validity of the contract depended. Such a defence was strictly in avoidance of the plaintiff's claim. It admitted the existence of a title originally sufficient to sustain the contract; but set up a new and distinct fact, in the nature of a condition subsequent, which, if proved, would defeat the plaintiff's right to recover The burden of proof was therefore on the defendants to estab lish it. They assumed the affirmative of this issue, and were bound to prove it.

2. To constitute a breach of the condition of insurance relating to a conveyance of the property, there must have been an actual sale or transfer of property, valid as between the parties. A change of title was necessary to invalidate the contract. Perhaps it was not material to prove that the transfer was absolute; nor that it conveyed the whole right of the plaintiff in the property; nor that it was a valid conveyance as to creditors. But it was essential that there should have been at least the form of a transfer. Under the instructions given on this point, the jury must have found that there was not even a formal alienation of the property. *Judgment on the verdict*

Varnum N. Taylor *vs.* Ætna Life Insurance Company.

Under a policy of life insurance, payable in a certain time "after due notice and proof of the death," a physician's certificate of the death is not an essential part of the proof, unless expressly required by the policy, or by a usage of the company made known to the plaintiff before he took the policy.

A person whose life is insured by a policy which permits him to pass by sea between certain ports "on first class decked vessels," does not forfeit the policy by going as a steerage passenger in such a vessel.

Action of contract on a policy of insurance on the life of Andrew Taylor, for seven years from the 11th of April 1855, in the sum of $700, payable "within ninety days after due notice and proof of the death of said Andrew Taylor, if within the term of this policy," with a condition that the policy should be

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void if the said Taylor should, without the consent of the company, indorsed upon the policy, pass beyond the settled limits of the United States or certain of the British Provinces, or west of the Rocky Mountains.

Annexed to the policy was a license, of the same date, from the company, by which, in consideration of an extra premium, said Taylor was "permitted to pass, by sea, in first class decked vessels, from any part of the United States, north of the thirty-ninth degree, north latitude, to and from any port bordering on the Pacific Ocean, and to reside in California," and also "to pass to and from California *via* Chagres and Panama or by the Nicaragua route."

Answer, 1st. That the plaintiffs never "furnished to the defendant sufficient, due and proper preliminary proofs of the death of the said Andrew Taylor, and of the time, circumstances and occasion of his said death, if the same occurred, nor any such as by law and usage in such case are reasonably required and by the terms of said policy provided for." 2d. That Andrew Taylor had not conformed to and performed the conditions and requirements of the policy, "for that the said Taylor, at the time of his said death, as claimed by the plaintiff, was on board the steamship Sierra Nevada on her passage from San Juan del Sur in the Republic of Nicaragua, Central America, to San Francisco, California, as a steerage passenger, and not as a first class passenger, by reason of which, and the unusual hazards incident to a steerage passage, the defendants are discharged from any liability to the plaintiff on account of the death of said Taylor as claimed by the plaintiff."

The parties submitted the case to the court upon the following agreed statement:

"Upon the first ground of defence stated in the answer, it is admitted by the plaintiff that no affidavit or certificate of the attending physician, as to the circumstances and occasion of the death of Andrew Taylor, was ever furnished to the defendants; although the plaintiff was informed, at the time he gave the notice and furnished certain other proofs of such death, that the defendants held such certificate or affidavit to be essential, and

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that, until furnished, the proof would not be considered complete, nor the loss payable. It is admitted that the ship's physician was present and attending during the sickness and at the time of the death of said Taylor; and the plaintiff offers no excuse for not furnishing such certificate, except the inconvenience and expense of sending to the Pacific Coast to obtain it.

"The defendants admit that notice and proofs of the fact of the death of said Andrew Taylor were furnished to them by the plaintiff on the 10th of February 1856, which were deficient only by reason of the absence of such certificate or affidavit of the attending physician; and the defendants claim that by the terms and reasonable intendment of the contract, and by the usage and understanding of this and other life insurance companies, such affidavit or certificate is a requisite and essential part of the preliminary proof, to be supplied by parties demanding the amount of the policy, under the circumstances aforesaid, and without which no recovery can be had by suit at law.

"Upon the second ground of defence, stated in the answer the plaintiff admits that the said Andrew Taylor was on board the said steamship Sierra Nevada, 'as a steerage passenger.' And the defendants admit that in no other respect did the said Andrew Taylor fail to conform to and perform the requirements and conditions of said policy and the license thereto attached. But the defendants claim that said license, by its terms and reasonable intendment, and by the understanding and usage of this and other life insurance companies, requires the party whose life is insured, when taking passage in a vessel, such as is indicated by said license, to do so as a first class passenger, and that said requirements are broken and departed from by taking passage as a 'steerage passenger;' and that if it had been known that he was to go as a steerage passenger, the defendants would, according to such understanding and usage, have either charged a much higher rate for such license, or declined to give it altogether.

"Upon the foregoing statement, it is agreed that the court shall enter such judgment as either party may be entitled to, and as law and justice require; it being understood and provided,

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however, that if the court shall be of opinion that proof of such understanding and usage as the defendants allege would be competent and material to the proper decision of the controversy, the case shall be remitted to the proper court for trial of such questions by a jury; and further, that if the court shall be of opinion that the plaintiff ought not to recover without furnishing the affidavit or certificate of the physician, he shall be allowed the opportunity to obtain and supply the same, or a sufficient excuse for its absence, with the same effect upon this suit as if furnished originally, except that such equitable adjustment of the costs or interest shall be made upon the final result, as the court may direct."

J. Wells, for the plaintiff.

F. Chamberlin, for the defendants, in support of the first ground of defence, cited Angell on Ins. §§ 24, 99, 375; 2 Phil. Ins. § 1811 *note;* and of the second, *Taunton Copper Co.* v. *Merchants' Ins. Co.* 22 Pick. 116; 1 Phil. Ins. § 460; Angell on Ins. §§ 24, 99.

METCALF, J. 1. By the terms of the policy, the sum insured was payable in ninety days "after due notice and proof of the death" of Andrew Taylor. Such notice and proof were therefore prerequisite to the maintenance of this action. The defendants, in their answer, deny that they were furnished by the plaintiff with such proof. They admit, however, in the statement of facts, that there was no defect in the proof of said Taylor's death, unless, in order to constitute due proof thereof, it was necessary to produce a sworn certificate, such as is hereinafter mentioned, of the physician who attended the deceased in his last sickness. The ground taken by the defendants is, that such certificate is a requisite and essential part of the preliminary proof of the death, and made so, not only by the terms and reasonable intendment of the contract contained in the policy, but also by their own usage and understanding, and the usage and understanding of other life insurance companies.

To support this ground of defence, the defendants have introduced (the plaintiff's counsel consenting) a pamphlet issued by them, which they were accustomed to give to claimants on their

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policies, and which, it is admitted by the plaintiff, was given to him by the defendants at the time when he presented to them his proof of Andrew Taylor's death. Under the head of "Proofs of Death Required," that pamphlet contained, among other required proofs, the following: "1st. A certificate from the physician who attended the party during his last sickness, stating particularly the nature of the disease, its duration, and the time of death." It was also a part of said required proof that the certificate "should be sworn to before a magistrate or other officer qualified to administer an oath or affirmation." As this matter is not contained in the statement of facts, we have taken it into consideration solely upon the consent of the plaintiff's counsel that we might. But, after adding this to the facts regularly agreed upon, we find no defence to the action. The policy does not embody nor refer to any by-law, requisition, usage or understanding of the defendants as to the kind of proof, which they should require, of the death of Andrew Taylor. Whatever, therefore, might be such by-law, requisition, usage or understanding, the plaintiff would not be bound thereby. He is bound only by the policy itself; that is, to furnish "due proof" of the death. If the defendants would have bound the plaintiff by their by-laws, &c. they should have made the policy, in terms, subject to those by-laws, &c. or in some way have made them a part of the contract contained in the policy. *Kingsley* v. *New England Mutual Fire Ins. Co.* 8 Cush. 393, 403.

The question, what is due proof, is to be determined by the court, according to the rules of evidence, and not by the defendants nor by any other life insurance companies. We are not informed what proof of death was presented to the defendants, and it is not necessary that we should know; for it is conceded by them that the proof was sufficient, if the physician's certificate was not a requisite part of it.

The usage of the defendants to require certain specified proof of death has been relied on in argument. In the first place, no such usage is duly shown. In the next place, if it were so shown, there is no pretence that the plaintiff had any notice of

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it when he took the policy. He therefore, for that reason, if for no other, could not be bound by it.

2 No authority was cited which sustains the position that Andrew Taylor, by taking passage as a steerage passenger, failed to conform to the license given to him by the defendants, to pass by sea in first class decked vessels, of which the steamship in which he took passage is admitted to be one. And the court do not know, judicially or otherwise, that life is less safe in the steerage, than in any other apartment of a vessel.

Judgment for the plaintiff.

Elihu Adams *vs.* County of Hampden.

The fee of "twenty cents for each and every prisoner committed or discharged," to which a jailer is entitled under *St.* 1836, *c.* 277, is not to be included in the allowance to the jailer of "a reasonable sum for his services, and for the support of the prisoners under his charge, and other necessary expenses," to be made by the county commissioners, subject to the revision of the court of common pleas, under *St.* 1846, *c.* 11, § 3.

The remedy of a jailer for the support of infant children of prisoners is against the town in which the prison is situated, and not by application to the county commissioners for an allowance under *St.* 1846, *c.* 11, § 1.

The keeping of a prison book, as required by *St.* 1848, *c.* 276, § 2, is not a condition precedent to an allowance by the county commissioners of additional compensation beyond the sum fixed by § 1 as the price of board.

The amount of additional compensation to be allowed to a jailer, beyond the price of board of prisoners, under *St.* 1848, *c.* 276, § 1, upon an appeal from the county commissioners to the court of common pleas, under *St.* 1846, *c.* 11, § 1, is within the discretion of that court, and not subject to revision on exceptions.

Hoar, J. This was an appeal to the court of common pleas from the decision of the county commissioners of Hampden County, disallowing certain claims made by the petitioner, as jailer for said county, under the *St.* of 1846, *c.* 11, § 3. Both parties have filed exceptions.

1. The first exception of the petitioner is to the refusal of the court to allow certain fees charged by him, "of twenty cents for each and every prisoner committed or discharged," by virtue of the provisions of the *St.* of 1836, *c.* 277.

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Without determining the correctness of the principle upon which the court proceeded, we are of opinion that this exception cannot be sustained, because we do not think these fees are included within "the reasonable sum for the services of the keeper of the prison, and for the support of prisoners under his charge, and other necessary expenses," of which an allowance is to be made by the county commissioners, subject to the revision of the court of common pleas, under the *St.* of 1846, *c.* 11. They are specific fees, expressly fixed and prescribed by law, for a specific service, relating to the detention and custody of prisoners. Whenever the jailer is entitled to them at all, he has an absolute legal right to the precise sum fixed by the statute, as perfect as the right of the officer to his fees for the service of a precept; and they are to be taxed and paid from the public treasury, without being subject to the allowance or estimate of the county commissioners, who have no control or jurisdiction over them whatever.

2. The second exception of the petitioner is to the disallowance of his charges for the support of infant children of prisoners committed by justices of the peace and police courts. These infants were not prisoners, and the provisions of law respecting the support of prisoners do not apply to them. If they were of such age, and came to the prison under such circumstances, that it was proper for the jailer to admit them, his remedy for the expenses of their maintenance is against the town in which the prison is situated. This was settled in the case of *Watson* v. *Cambridge*, 18 Pick. 470; and there has been no statute since that case was decided, which alters the law on this point, unless it be the *St.* of 1858, *c.* 57; and the exceptions find that the case does not come under the provisions of that act. This exception must therefore be overruled.

3. The first exception of the respondents is, that the court of common pleas allowed the petitioner a larger sum for the support of prisoners than had been allowed by the county commissioners, although he had not kept and exhibited to them the prison book required by *St.* 1848, *c.* 276, § 2. The statute requiring him to keep such book is, as we think, directory

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merely. His compensation is not expressly, or by implication, made to depend upon it. A failure to keep and exhibit it would undoubtedly be found an obstacle in the way of establishing a claim to additional compensation, beyond the sum fixed by the first section of the statute as the price of board; but it is no legal bar to such a claim, if sustained by other satisfactory evidence.

4. The court of common pleas allowed certain charges "for the support of prisoners and other necessary expenses," without proof that the price of $1.75 a week for the board of prisoners was not an adequate compensation. We are of opinion that the decision of the court of common pleas upon this subject is final, and not subject to revision upon exceptions. By the *Sts.* of 1846, *c.* 11, § 3, and 1848, *c.* 276, § 1, the whole matter of the support of prisoners, and the expenses incident to their custody, with the exception of the minimum price of board established by the latter statute, is made subject to the discretion of the county commissioners in the first instance, with the right reserved to the jailer to apply to the court of common pleas, if dissatisfied with the allowance which is made to him. When the matter is thus brought before the court of common pleas, the whole question of his compensation is within their discretion. The court acts as an auditing board, and whether the additional compensation claimed by the jailer is for the board of prisoners, or for other services or expenses, it is to be allowed or disallowed by the court upon such reasons as seem to them satisfactory and reasonable. It is not a question of contract or of private right, upon which the court act judicially. The jailer is not obliged to hold the office, if he is not satisfied with the tribunal appointed by law to fix his compensation. The legislature has thought that the interests of the public might be safely entrusted to the court of common pleas; and no authority is given to this court to interfere with the exercise of their discretion. Whatever that court may think should be reasonably and properly included in the term "board," what price should be allowed for it, and what items of charge should be treated as services or expenses entitled to additional compensation, they

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are to determine. These are not questions of law, but of fact, to be decided according to the circumstances of the case.

It was upon a like principle, that it was held in *Weymouth, petitioners*, 2 Cush. 335, that no exception would lie to the decision of the court of common pleas upon the petition of a town for the approval of by-laws; and in *Richardson* v. *Curtis*, 2 Gray, 497, upon the allowance of compensation to the person who presided at a trial before a sheriff's jury.

5. The court allowed certain "key fees" which had been disallowed by the commissioners, and which were fees of the same description as those mentioned in the first exception taken by the petitioner. Without intending to intimate that the court were mistaken in the opinion that the jailer was entitled to those fees, we think, for the reasons before stated, that the question was not properly before them.

The case is therefore to be remitted to the superior court, to enter the proper order upon the petition.

G. Ashmun, for the petitioner.

E. B. Gillett & C. A. Winchester, for the respondents.

Aaron Gould *vs.* Boston Duck Company.

The owners of a mill, who interrupt the flow of the water of the stream on which it is built, no more than is necessary for their own reasonable and proper use of the water, consistently with the common interest of all riparian proprietors on the same stream, are not liable to an action by the owner of a mill below, for not regarding, in their use of the water, his peculiar necessities, arising from the size and character of his pond and the nature of his work, although his mill had been established, and such work carried on there, for eighty years before the building of their mill.

In estimating what is a reasonable use of water power by a millowner, usage, and the state of mechanical and manufacturing advancement, are to be considered.

An action against the owners of a mill by the owner of a lower mill on the same stream cannot be maintained on the following facts: The defendants' mill was adapted and appropriated to the size, capacity and water of the stream, and caused no further disturbance or interruption of the flow of the water to the plaintiff's mill than was necessary and unavoidable in its reasonable use for the defendants' mill, "but without reference to the plaintiff's necessities or demand for water in such periods of extraordinary drought

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as occasionally occur on this stream, when the water, though sufficient to operate the plaintiff's mill, would be insufficient to operate the defendants'; and without reference to any prescriptive or prior right of the plaintiff as the occupant of the older privilege." In seasons of drought, the defendants were obliged, in order to create the requisite head and supply of water for their mill, to shut their gates occasionally during working hours, and thus interrupted the flow of the water to the plaintiff's mill; "but this was not done wantonly, but with a reasonable regard to the best interest and advantage of the defendants as proprietors of their mill, and in conformity with the general usage of mill owners running mills on this and other similar streams;" nevertheless, "in so doing, the defendants acted wholly irrespective of the plaintiff's interests, and of his necessities or demands for water, and neither acknowledged nor conformed, wholly or in part, to any claim made by the plaintiff that a sufficient quantity should be left flowing to operate the plaintiff's mill."

Action of tort by the owner of a mill on Swift River in Palmer against the owners of another mill higher up on the same stream, for unreasonably detaining and using the water thereof, to the injury of the plaintiff's mill. The case was referred to arbitrators, and was submitted to the court upon their report, of which the following were the material parts:

"1. We find that for a period of more than one hundred years a grist mill and saw mill have been operated on the site now occupied by the plaintiff's grist mill and saw mill, on Swift River in Palmer.

"2. We find that the plaintiff purchased said mills and privilege of Emelius Bond in 1851, and that the defendants acquired their title to the lands occupied by their factory (which is situate about fifty rods above the plaintiff's dam) under a deed of warranty from said Emelius Bond, Horace Parmenter and Benjamin Leonard, dated January 1st 1836; that said Bond at the date of said deed was the owner of the mills and privilege now owned by the plaintiff: and that, in the deed of said Bond and others to the defendants, the grantors reserved the right to maintain the said Bond's dam, and to flow the water thereby to a certain specified height.

"3. We find that the defendants, having purchased a tract of land of one thousand acres on both sides of the stream above their said factory site, flowed the same by building a substantial dam thereon in the year 1846; and from the reservoir, thus created, they have drawn the necessary supply of water for their factory, through a canal running parallel with the bed of the

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stream, returning however, all the water so used into the stream above the plaintiff's dam.

"4. We find that prior to the erection of the defendants' factory, the plaintiff and his predecessors had been accustomed to run their saw and grist mill sometimes by night, and out of the usual working hours, as well as by day and in regular working hours; but we find that at no particular seasons or periods were they accustomed to run said mills out of working hours, and only as the occasional pressure of business might demand; and we find that they had followed this practice more than twenty years prior to the erection of the defendants' factory, or to the sale of said factory site by said Bond and others to the defendants.

"5. We find that the defendants completed and commenced running their factory in 1848, and their entire works, operated on said canal, were of about two hundred and fifty horse power; but we find that said works were of such magnitude only as were adapted and appropriate to the size and capacity of said stream and to the quantity of water usually flowing therein. But in our judgment as to said adaptation and suitableness of said works to said stream we have had reference to the ordinary volume and flow of water at different seasons; but no reference to the plaintiff's necessities or demand for water in such periods of extraordinary and extreme drought as occasionally occur on this stream, when the water, though sufficient to operate the plaintiff's mills, would be insufficient to operate the defendants' factory; nor had we reference to any prescriptive or prior right in the plaintiff as the occupant of the older privilege.

"6. We find that the defendants have caused no further disturbance or interruption of the flow of water to the plaintiff's mills, than was necessary and unavoidable in and by the reasonable and proper use of it for the propelling and working of the defendants' factory. But in estimating such reasonable and proper use we have had no regard to the plaintiff's necessities or demands for water at such seasons of extraordinary and extreme drought as occasionally occur on this stream, when the

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water, though sufficient to operate the plaintiff's mills, would be insufficient to operate the defendants' factory; nor had we reference to any prescriptive or prior right in the plaintiff as the occupant of an older privilege.

"7. We find that during the season of greatest drought in the years of 1851, 1852, 1853 and 1854, the defendants were not able to operate their factory throughout the usual working hours of each working day, but were obliged, in order to create the requisite head and supply of water for their own works, to shut their gates earlier than usual on some days, and sometimes for a whole day at once; but this was not done wantonly, but was done with a reasonable regard to the best interests and advantage of the defendants as proprietors of said factory, and in conformity with the general usage of millowners running mills on this and other similar streams. But we further find that in so doing the defendants acted wholly irrespective of the plaintiff's interests, and of his necessities or demands for water, and neither acknowledged nor conformed wholly or in part to any claim made by the plaintiff that a sufficient quantity should be left flowing to operate the plaintiff's mills.

"8. We find that the number of working hours lost to the plaintiff by thus shutting the defendants' gates in order to replenish their pond, would, during the period sued for, viz.: from the 1st of June 1851 to the 16th of February 1857, in the aggregate, amount to an average of eight and a half days in each of the years 1851, 1852, 1853 and 1854; while in the years 1855, 1856 and 1857 it did not appear there was any loss of working time or hindrance to the plaintiff's mills or to the defendants' factory from drought, or any cause imputable to the defendants. And we further find that the above proportion of working time lost is less than the time usually lost each year by similar mills and manufacturing establishments on this and other similar streams from drought.

"9. We find that the plaintiff's mills require less than half the supply of water necessary for operating the defendant's factory, and that during the dry season aforesaid the plaintiff might have run his mills, or one of them, during working hours, had

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not the defendants, by shutting their gates, stopped the supply of water during a portion of the usual working hours as aforesaid; and we find also that in each dry season as aforesaid, as well as at other times, the defendants have discharged through their wheels at least double the quantity of water necessary for operating the plaintiff's mills, and that the surplus so discharged flowed over the plaintiff's dam, and was of no use or benefit to the plaintiff. But we find that the defendants could not have run their factory, so as to have afforded a supply graduated to the wants of the plaintiff, without serious detriment to their own interests, much greater than is sustained by the plaintiff from the causes complained of.

"10. Whether upon the foregoing findings of fact it was the duty of the defendants, in point of law, to leave their gates or any of them so far open that a supply of water would flow to the plaintiff's mills during all of working hours in each dry season, or during any part of such hours as the defendants, having a reasonable but exclusive regard to their own necessities, were obliged to stop their works, we refer to the consideration of the court; and if it was any part of the reasonable duty of the defendants to consider the plaintiff's necessities and demands for water during regular working hours, or to consider and observe any prescriptive or prior right in the plaintiff thereto, and in any respect to conform to the same by furnishing him with water at the time, or during any part of the time, when their own necessities required them to shut their gates, we find for the plaintiff, and award as damages for the detention of water during the years aforesaid (but for no other cause) the sum of three hundred and eighteen dollars. Furthermore, if it was any part of the defendants' reasonable duty to furnish a supply of water to the plaintiff out of the usual working hours, to enable him to run his mills as he had been occasionally accustomed to run them, at irregular and unusual hours, then we further find on this ground nominal damages and assess the same at one dollar. If on neither of the grounds or for neither of the causes above set forth the plaintiff is entitled to recover, we find for the defendants."

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E. W. Bond, for the plaintiff. 1. By the report of the referees, the plaintiff is entitled to recover damages to the amount of three hundred and eighteen dollars, if it was any part of the defendants' duty to observe any prescriptive or prior right of the plaintiff to have sufficient water flow during regular working hours to operate his saw mill and grist mill.

The plaintiff had such prescriptive right; as the report finds that for more than one hundred years a saw mill and grist mill have been accustomed to be run by the plaintiff and his predecessors, during regular working hours, on the site now occupied by the plaintiff's mills. It was the duty of the defendants, whose dam was not built till 1846, to observe this prescriptive right; instead of which they shut their gates, whenever their own convenience and interests dictated, so as to occasion a loss to the plaintiff of an average of eight and a half working days annually for four years. Angell on Watercourses, § 230. *Cary* v. *Daniels*, 8 Met. 479. *Hodges* v. *Raymond*, 9 Mass. 316. *Pitts* v. *Lancaster Mills*, 13 Met. 156. *Bigelow* v. *Newell*, 10 Pick. 348. *Bolivar Manuf. Co.* v. *Neponset Manuf. Co.* 16 Pick. 241. *Elliot* v. *Fitchburg Railroad*, 10 Cush. 196. *Thurber* v. *Martin*, 2 Gray, 394. *Wentworth* v. *Poor*, 38 Maine, 243. *Balston* v. *Bensted*, 1 Campb. 463. *Mason* v. *Hill*, 3 B. & Ad. 304. 3 Kent Com. (6th ed.) 441, 442.

2. Priority of occupation, of itself, secures to the first occupant the exclusive right to the use of the water, to the extent of his occupation. *Cary* v. *Daniels*, 8 Met. 477. *Thurber* v. *Martin*, 2 Gray, 394. *Wentworth* v. *Poor*, 38 Maine, 243. The report finds that during all the periods of interruption complained of, the quantity of water flowing in the river was necessary and sufficient (but for the defendants' use) to operate the plaintiff's mills during regular working hours, as he had been accustomed to use the water.

The prescriptive or prior rights of the plaintiff were not an easement, liable to be extinguished by unity of ownership; but were parcel of the estate, and remained with it, unless expressly conveyed to the defendants. *Cary* v. *Daniels*, 8 Met. 480. Moreover, there never was any unity of possession; for Bond

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alone owned the plaintiff's premises; and the defendants' premises in common with Parmenter and Leonard. And the reservation in their deed to the defendants shows the intention to leave the rights of the parties as they were before.

3. The report finds that the plaintiff is entitled to recover damages to the amount of three hundred and eighteen dollars, if in determining the suitableness of the defendants' mill to the stream, or in determining whether the defendants made a reasonable and proper use of the water, regard should be had not merely to the ordinary volume and flow of water, and to the defendants' wants and circumstances, but to the quantity of water, and to the plaintiff's necessities for water in such seasons of drought as occasionally occur on this stream, when the water, though sufficient to operate the plaintiff's mills, would be insufficient to operate the defendants' factory. And it expressly appears that in shutting their gates earlier than usual some days, and sometimes for a whole day, the defendants had regard only to their own interests and advantage, and acted wholly irrespective of the plaintiff's interests and necessities, and entirely disregarded his claim, that enough water should be left flowing to operate his mills. The defendants are therefore liable. 3 Kent Com. 440. *Anthony* v. *Lapham*, 5 Pick. 175. *Barrett* v. *Parsons*, 10 Cush. 367. *Sampson* v. *Hoddinott*, 1 C. B. (N. S.) 590. *Mason* v. *Hill*, 3 B. & Ad. 304.

Nothing short of a prescriptive right could justify the defendants in such a course as they pursued; and no such right is claimed by them.

The facts, that in shutting their gates during working hours in dry seasons, the defendants acted in conformity to the general usage of mill owners, on this and similar streams, and that the proportion of working time lost by the plaintiff was less than that usually lost by similar mills on this and other streams, from drought, cannot affect the plaintiff's right to recover.

4. The defendants are clearly liable to the plaintiff, for discharging the water, after filling their pond, so that half of it ran to waste and was lost by the plaintiff. *Thurber* v. *Martin*, 2 Gray, 395. Angell on Watercourses, § 115.

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The fact, that if the defendants had graduated the supply of water according to the plaintiff's wants, they would have sustained a greater damage than the plaintiff suffered from having his supply cut off, cannot affect his right to recover.

5. The plaintiff is entitled to recover the nominal damages mentioned in the report, because, for more than twenty years before the defendants bought their site, the plaintiff and his predecessors had run their saw and grist mills, sometimes by night and out of usual working hours, though at no particular seasons or periods, and only as the occasional pressure of business required.

R. A. Chapman, for the defendants, cited *Cary* v. *Daniels*, 8 Met. 476, 477; *Pitts* v. *Lancaster Mills*, 13 Met. 156; *Barrett* v. *Parsons*, 10 Cush. 367; *Thurber* v. *Martin*, 2 Gray, 394; *Wolcott Woollen Manuf. Co.* v. *Upham*, 5 Pick. 292; *Shaw* v. *Wells*, 5 Cush. 537; *Rockwood* v. *Wilson*, 11 Cush. 221; *Gould* v. *Bugbee*, 6 Gray, 371; *Blyth* v. *Birmingham Waterworks*, 11 Exch. 781; *Wood* v. *Waud*, 3 Exch. 780; *Embrey* v. *Owen*, 6 Exch. 368.

Shaw, C. J. This is an action of tort, to recover damage, done to the plaintiff, in the use of his mills, situated on Swift River, so called, by the defendants, in erecting on their own land on the same river, and above the mills of the plaintiff, mills and manufactories of greater magnitude than were adapted and appropriate to the size and capacity of said river, and to the quantity of water flowing therein, and using the water of said river in an unreasonable manner, and detaining the same in a pond or reservoir, for unreasonable periods of time, both in the day and night, and discharging the same in excessive quantities, so that much of it ran to waste and was lost to the plaintiff, depriving him of the water power.

This case having been submitted to referees, by rule of court, their report, by agreement of parties, is now to be taken as a statement of facts. It involves the relative rights of riparian proprietors on the same stream or watercourse, as it passes through their respective lands, to the use of the power of such current, for hydraulic purposes. These rights depend mainly

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upon the rules and principles of the common law, somewhat altered and modified by the series of enactments known as the mill acts of Massachusetts. This rule is, that every proprietor of land through which a watercourse runs has a right to the use of the impelling force of the current, or what is more familiarly called the head and fall of the current, for mill purposes, so far as they exist on his own land, if there be any such head and fall within his own limits. If the water flows at nearly a level, there will be no such available head and fall. If the descent be very rapid, there will be such head and fall, and of course mill sites or privileges, at short distances from each other. If the descent be gentle and regular, and the land of a proprietor not extensive, the head and fall on his own land may be quite insufficient for practical use, for mill purposes. This latter consideration probably led to an early modification of the common law in Massachusetts, by a provision that such a proprietor might erect a dam on his own land and raise a head of water to his own best advantage, although it might raise the water in the bed of the river, beyond and above the limits of his own land; notwithstanding it might flow back, by such rise in the bed of the river, upon the land of other proprietors — with a provision for a compensation in damages.

These provisions have effected a change in the common law to this extent: By the common law, the rights of each successive riparian proprietor to the reasonable use of the mill power of the stream are equal; each has a right to a reasonable use of it as it passes through his own land only, with a right incident thereto to erect such dams, canals, sluices and water ways, as to fit it for the actual working of mills. By the right given by the mill acts to any proprietor to flow back beyond his own limits, the common law is changed to some extent. Before any mills are erected, the right of each proprietor is the same; it is a right to appropriate the power of the stream, by the actual erection of a mill, though the head and fall within the limits of his own land are insufficient, and, in order to get sufficient head he raises his dam so as to flow beyond his own limits. The necessary consequence is, that when one proprietor, under

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the common right, has in fact appropriated the power, the proprietor below is so far restricted in his right of appropriation, that he cannot erect a mill on his own land, and flow back the water, to the destruction of the mill already erected by authority of law. This priority of first possession necessarily arises from the nature of appropriation; where two or more men have an equal right to appropriate, and where the actual appropriation by one necessarily excludes all others, the first in time is the first in right. *Cary* v. *Daniels*, 8 Met. 466.

By the rule that all proprietors of land through which a watercourse passes have an equal right to the use of the power of the stream for mill purposes, it is not to be understood that each or any one has a right to the natural flow of the stream in the manner in which it ran originally, or as it would run if no mill were erected on it, or to be worked by it; in its mere natural flow, it affords no power. Dams must be made to raise it, and canals and sluices to conduct, apply and discharge it. The right to erect these works, and to change the natural mode of the flow of the current, is incident to the right of applying it to the working of mills, and this right therefore is common to every riparian proprietor. Each therefore must exercise his own reasonable right with a just regard to the like reasonable use by all others. The mere erection of a dam, and the use of the water in driving wheels, must necessarily derange its steady and constant natural flow, and substitute a different manner, as to the time and mode of holding it up and letting it down. So far as such mode is reasonably incidental to the use of the stream for mill purposes, it is the right of the proprietor, and constitutes, in part, the mill privilege which the law gives him.

In examining the facts in the present case, the court are of opinion that the plaintiff acquired no prior right, by prescription or otherwise, to any particular mode of using the water. It must be some use inconsistent with, and therefore adverse to the right of others, which can be acquired by prescription, such as diverting the water from its natural course. So far as he uses it equally, and in a manner consistent with the equal and common right of others, he makes no adverse use, and ac-

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quires no right adverse to theirs. It appears that the plaintiff had a great abundance of water, beyond what was necessary for working his own mills, and could work them day or night, without encroaching on the right of any other, above or below.

We are also of opinion, that nothing stated in the facts, as to the manner in which the parties respectively acquired their rights to their respective estates, affects the right of either against the other, as millowners; but that the rights of the parties respectively, as owners of mills, must depend upon the rules of law, regulating the rights of riparian owners, as established in this commonwealth.

Upon the facts agreed, the court are of opinion, that the defendants did not exceed their just right in the use of this water power.

It appears that the defendants built a substantial dam across the river, that the water was drawn into their manufactory by a canal, and, after being run upon their wheels, was wholly returned to the bed of the stream above the plaintiff's mills; and that the works of the defendants "were of such magnitude only as were adapted to the size and capacity of the stream and to the quantity of water usually flowing therein." It also appears that "the defendants have caused no further disturbance or interruption of the flow of water to the plaintiff's mills, than was necessary and unavoidable in and by the reasonable and proper use of it, for the propelling and working of the defendants' factory." What is a reasonable use of water power may often be a difficult question, depending upon a great variety of circumstances; somewhat upon usage, upon the state of mechanical and manufacturing advancement. Usage is some proof of what is considered a reasonable and proper use of that which is a common right; because it affords evidence of the tacit consent of all parties interested, to the general convenience of such use. The circumstances above stated, we think, are decisive of the present case, and show that the defendants made no other than a reasonable use of the water; and if this did interfere at times, with the use which the plaintiff might have made of the water

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if the defendants had had no occasion to use it, it was *damnum absque injuria.*

But the referees who report these facts further say, that in making their estimate of the suitableness of the works to the stream, they "have had reference to the ordinary volume and flow of the water, at different seasons; but no reference to the plaintiff's necessities for water in times of extraordinary and extreme drought, when the stream, though sufficient to operate the plaintiff's mills, would be insufficient to operate the defendants' factory." By this we understand that they did not take into consideration the plaintiff's necessities, arising from his peculiar business, the height of his pond, the capacity of his reservoir and the nature and character of his works. One of the grounds of the plaintiff's complaint was, that when the water was very low, in time of drought, and the defendants detained it a few hours, or in one instance a whole day, to raise the water to a sufficient height to work their own factory, it came to the plaintiff's mill faster than he could use it, and ran to waste over his dam. If it was so, it was because he had works not adapted to the entire or the best use of the stream; because his dam was too low, his reservoir not of sufficient capacity, or other cause, by which he was prevented from making the best use of the power of the water, when very low by reason of drought. If there was a loss of water at such times and from such cause, it was not one for which the defendants were responsible.

As there was no detention of the water in ordinary stages of water, and no other detention of the water by the defendants, in times of extreme drought, than what was necessary to the reasonable use of their own mills, we are of opinion that it was not their duty, in point of law, to open their gates, or leave them open without using the amount to such extent as they might, merely because the plaintiff's works were of such a character that his necessities required such flow of the water.

Judgment for the defendants

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF WORCESTER, SEPTEMBER TERM 1859,
AT WORCESTER.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. GEORGE T. BIGELOW,
HON. PLINY MERRICK,
} JUSTICES.

RUEL ROBINSON & another *vs.* WILLIAM A. RICHARDSON, Judge of Probate and Insolvency for the County of Middlesex.

The *St.* of 1856, *c.* 284, § 36, providing for the issuing of warrants by judges of insolvency on the complaint of an assignee, to search for property of the debtor, is unconstitutional and void.

MERRICK, J. This is a petition for a writ of mandamus, to be addressed to the respondent, requiring him, in the discharge of his official duties, to receive the complaint theretofore presented to him by the petitioners, and to hear the evidence which they shall produce in support of the allegations therein set forth; and if he shall thereupon be satisfied that they have reasonable cause for the belief therein by them expressed, to grant to them

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as assignees of the estate of Isaac E. Stevens, an insolvent debtor, or to the messenger appointed to take possession of his estate, a warrant to search in the places and for the property and books of account in their said complaint particularly mentioned and described.

This petition, in pursuance of the provisions of § 38 of the *St.* of 1859, *c.* 196, was presented to one of the justices of this court, by whom, after the respondent had filed his answer, the parties were heard.

Upon that hearing it appeared that the petitioners had been duly appointed assignees of the estate of said Isaac E. Stevens, an insolvent debtor, and that they had theretofore, as alleged in their present petition, made and presented to the respondent a written complaint, in due form of law, and upon their respective oaths, wherein they represented and affirmed that there was reasonable cause to suspect and believe, and that they did suspect and believe, that certain property and books of account, belonging to the estate of said Stevens, were secreted and concealed in the several places by them therein mentioned and described, and thereupon prayed that a warrant might be granted, according to law, to search for the same. This complaint was received by the respondent; but he refused to hear the evidence offered in support of the allegations set forth in it, or to issue the warrant prayed for in pursuance of the provisions of the *St.* of 1856, *c.* 284, § 36, upon the ground that the proceedings therein authorized are in violation of the constitutional right of every citizen to be secure from all unreasonable searches and seizures of his person, his houses, his papers and all his possessions. Declaration of Rights, art. 14.

The questions of law and of right, arising upon these facts, involving an inquiry into the validity of the provisions of an act of the legislature, enacted in observance of all the formalities required by law, and being also of great public and practical importance, it was deemed advisable by the justice by whom the petition was heard, that it should be adjourned into this court for final adjudication. *St.* 1859, *c.* 196, § 38.

The statute provides that whenever complaint shall be made

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by the messenger or assignees of the estate of an insolvent debtor to any judge of insolvency, that there is reason to suspect and believe, and that they do suspect and believe, that any personal property, or any books, deeds, documents, securities, papers or writings, belonging to his estate, are secreted or concealed in any particular house, premises or other place, such judge is authorized and directed, if he shall be satisfied that there is reasonable cause for such belief, to grant a warrant to the messenger or assignees to search for such property, &c.; and that it shall be lawful for such messenger or assignees to execute the warrant according to its precept; and that the messenger or assignees shall be entitled to the same protection as is allowed by law in the execution of a search warrant for property reputed to be stolen and concealed. *St.* 1856, *c.* 284, § 36.

The question then directly arises, whether it is within the constitutional power of the legislature to confer authority upon any magistrate or judicial tribunal to issue a warrant under the circumstances and for the purposes in the statute enumerated and described, or upon any officer or citizen a right to serve and execute it. And this is the only question which there is any occasion now to consider; for if such a warrant cannot lawfully be issued or served, it would have been wholly useless for the judge to whom the complaint was presented, to have investigated or ascertained whether the complainants had reasonable cause for their alleged suspicion and belief. It would certainly have been useless, and was therefore unnecessary, to receive evidence or institute inquiries concerning the truth of allegations, upon which, however clearly they might be established, nothing could be done, because the relief and process prayed for could not lawfully be granted.

Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings, or for the maintenance of any mere private right; but their use was confined to cases of public prosecutions, instituted and pursued for the suppression of crime or the detection and punishment of criminals. Even in those cases, if we may rely on the authority of Lord Coke,

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their legality was formerly doubted; and Lord Camden said that they crept into the law by imperceptible practice. But their legality has long been considered to be established on the ground of public necessity, because without them felons and other malefactors would escape detection. *Entick* v. *Carrington*, 19 Howell's State Trials, 1067. 1 Chit. Crim. Law, 64. The principles upon which the legality of such warrants could be defended, and the use and purpose to which, by the common law, they were restricted, were well known to the framers of our constitution. *Commonwealth* v. *Dana*, 2 Met. 336. Having this knowledge, it cannot be doubted that by the adoption of the 14th article of the Declaration of Rights it was intended strictly and carefully to limit, restrain and regulate the granting and issuing of warrants of that character to the general class of cases, in and to the furtherance of the objects of which they had before been recognized and allowed as justifiable and lawful processes, and certainly not so to vary, extend and enlarge the purposes for and occasions on which they might be used, or to make them legal and available in the course, or for the maintenance, of civil proceedings. All searches therefore, which are instituted and pursued upon the complaint or suggestion of one party into the house or possessions of another, in order to secure a personal advantage, and not with any design to afford aid in the administration of justice in reference to acts or offences in violation of penal laws, must be held to be unreasonable, and consequently under our constitution unwarrantable, illegal and void.

The provisions of the *St.* of 1856, *c.* 284, § 36, seem clearly to be obnoxious to this objection. The search warrant which the judge of insolvency is thereby, upon the complaint of the assignees of an insolvent debtor, authorized to grant, has no relation to alleged criminal acts, or the support of any public prosecution, but is to be used exclusively in mere civil proceedings, and as a remedial process in cases where nothing but a personal claim or the right to prosecute a private suit is involved. Any authority given for such purposes is in violation of the fundamental principle that every citizen is entitled to

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be free from all unreasonable searches of his houses and possessions, and therefore it cannot lawfully be conferred.

The provisions in this section of the statute are also objectionable for other reasons. The warrant to be issued allows a search in the places and for the property described in it. But this is all. The property, if found, is not to be seized, attached, removed or secured; nor is the person, in whose possession it is found, to be notified or summoned to appear before any tribunal or magistrate to account for his possession, or to vindicate any claim he makes to it; and no provision is made for any proceeding under the warrant, by which the conflicting rights which different parties may assert may be inquired into or determined. The search therefore, which is thus allowed to be made, is solely for discovery of evidence for the benefit of the party upon whose complaint the warrant is granted, and of which he may desire to avail himself in the prosecution or defence of some other distinct and separate civil suit or proceeding. This is manifestly an unreasonable exercise of power. Certainly no person ought to be compelled to disclose any facts or information to be given as evidence against himself or his own individual interest, until he has at least had an opportunity of urging his objections, and has then been required to do so by some competent judicial tribunal having authority and rightful jurisdiction to decide the question.

For these reasons, that portion of the statute which authorizes the granting of a search warrant on the complaint of assignees of an insolvent debtor, to be served and executed in the manner and for the purposes therein stated, must be held to be invalid. The judge of insolvency for the county of Middlesex therefore rightly refused to grant the prayer of the complainants, as set forth in their complaint, and their present petition for a writ of mandamus must accordingly be dismissed.

F. H. Dewey & H. Williams, for the petitioners.

Note. By the Gen. Sts. of 1860, the St. of 1856, *c.* 284, is repealed, and the provisions of § 36 are not reënacted.

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Aaron Claflin *vs.* Daniel T. Thayer.

A replevin bond, from a person not the plaintiff, with one surety, is not such a bond "from the plaintiff or from some one in his behalf, with sufficient sureties," as is required by the Rev. Sts. *c.* 113, § 29; and if objection is made at the return term, the action of replevin must be dismissed.

A motion to dismiss an action of replevin, for want of a sufficient bond, sufficiently states the cause of the motion, by alleging that the officer did not before the service of the writ "take from the plaintiff or some one on his behalf a bond to the defendant with sufficient sureties," &c., enumerating all the requisites of the Rev. Sts. *c.* 113, § 29.

The filing of an affidavit of merits simultaneously with a motion to dismiss is not a waiver of that motion.

Replevin of a horse, harness and wagon, of the value of $225. The bond taken from the plaintiff by the officer, before serving the writ, was a bond of John P. Daniels as principal, and Charles F. Claflin as surety, in the sum of $450, with the usual condition of a replevin bond.

On the third day of the first term the defendant filed an affidavit of merits; and on the same day a motion to dismiss the action, "because the officer who served the writ in said case did not, before the service of the writ in said case, take from the said plaintiff, or some one in his behalf, a bond to the defendant with sufficient sureties, to be approved by the officer, in double the value of the goods sought to be replevied in said case, with condition to prosecute this replevin to final judgment, and to pay such damages and costs as the defendant shall recover against him, and also to return the said property in case such shall be the final judgment in said case; and because the said officer has not complied with the requirements of the law in the service of the writ in said case, nor obtained from the plaintiff or some one in his behalf such a bond to the defendant as is required by law in such case; and because no bond was given to the defendant by the plaintiff, or any such bond as is required by law." The court of common pleas dismissed the action, and the plaintiff appealed.

T. G. Kent, for the plaintiff. 1. The bond given is a good bond at common law. *Simonds* v. *Parker*, 1 Met. 512. *Chandler* v.

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Smith, 14 Mass. 313. *Morse* v. *Hodsdon*, 5 Mass. 314. *Judson* v. *Adams*, 8 Cush. 560. *Burroughs* v. *Lowder*, 8 Mass. 373. *Keene* v. *Deardon*, 8 East, 298.

2. The motion to dismiss does not state any specific defect in the bond, and does not therefore raise any question as to its sufficiency. *Wolcott* v. *Mead*, 12 Met. 516.

3. All objections to the bond were waived by the general appearance and filing the affidavit, simultaneously with the motion to dismiss. *Greenwood* v. *Lake Shore Railroad*, 10 Gray, . *Cole* v. *Ackerman*, 7 Gray, 38. *Carlisle* v. *Weston*, 21 Pick. 535. *Seagrave* v. *Erickson*, 11 Cush. 89. *Pratt* v. *Sanger*, 4 Gray, 84. *Martin* v. *Commonwealth*, 1 Mass. 347. *Pattee* v. *Harrington*, 11 Pick. 221. *Doughty* v. *Lascelles*, 4 T. R. 520.

P. P. Todd, for the defendant.

METCALF, J. 1. Though a replevin bond, which does not conform to the Rev. Sts. *c.* 113, § 29, may be good at common law, yet the defendant in replevin is entitled, if he seasonably require it, to such a bond as is prescribed by statute, namely, a bond "from the plaintiff, or from some one in his behalf, with sufficient sureties." Such a bond was not given in this case, and the defendant's motion to dismiss the action for that cause was rightly granted by the court of common pleas; it having been made at the return term of the writ. *Clark* v. *Connecticut River Railroad*, 6 Gray, 363. If the defendant had delayed the motion till a subsequent term, it would have been too late. *Simonds* v. *Parker*, 1 Met. 508.

2. The cause of the motion to dismiss the action is sufficiently stated.

3. A point, which does not arise on the papers in the case, was raised in argument. It was said by the plaintiff's counsel, and admitted by the counsel for the defendant, that the motion to dismiss the action, and an affidavit of defence on the merits, were filed simultaneously; and the plaintiff has contended that the affidavit was a waiver or a revocation of the motion. We do not think so. By § 10 of the practice act, (*St.* 1852, *c.* 312,) it was necessary that the defendant should file an affidavit of defence, during the return term, to save him from the

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danger of a default. Hence it was decided in 6 Gray, *ubi sup.*, that an affidavit filed after a motion to dismiss was not a waiver of that motion. *A fortiori*, it would seem that a filing of both at once should not prevent effect being given to each in its order. When two acts are done at the same time, that shall take effect first, which ought in strictness to have been done first, in order to give it effect. Plow. 540.

Judgment of dismissal affirmed

JONATHAN DAY *vs.* DENNIS CROAK.

A writ of review of a judgment of the court of common pleas, granted by this court, and returnable here under the Rev. Sts. *c.* 99, § 25, is to be entered in this court, although the sum demanded is less than $1,000, and the *St.* of 1859, *c.* 196, took effect after the writ was sued out and before its return.

WRIT OF REVIEW of a judgment of the court of common pleas, granted by this court at the last April term, and sued out on the 28th of June, returnable to October term 1859 of this court. The original action was an action of contract, with an *ad damnum* of $300.

D. Foster, for the plaintiff in review, now suggested a doubt whether the writ should be entered in this court, under the Rev. Sts. *c.* 99, § 25; or at the next term of the superior court, under the provision of the *St.* of 1859, *c.* 196, § 3, as one of the "writs which are made returnable to the supreme judicial court, in actions at law, wherein the sum demanded is limited to" $4,000 in Suffolk, and $1,000 in other counties.

G. Swan, for the defendant in review.

THE COURT held, that the provision of the Rev. Sts. *c.* 99, § 25, that all reviews granted by this court should be tried in this court, was not affected by *St.* 1859, *c.* 196, and ordered the writ to be entered at the next *nisi prius* term of this court in this county. See *Buck* v *Wolcott*, *ante*, 268.

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Hartley Williams *vs.* Silas J. Brimhall.

A debt due from one partner cannot be set off in an action by the assignee in insolvency of the partnership on a debt due to the partnership.

A contract by one of two partners in the business of building houses, made without the knowledge of the other, to build a house in payment of a private debt of his own, is a fraud upon the partnership, and void, if the creditor knows that the two are partners in that business; and if both partners actually do the work, they or their assignee in insolvency may recover therefor of such creditor, without proving the terms of their copartnership, or that the partner who made the contract agreed that the work should be done by the partnership.

Action of contract by the assignee in insolvency of the joint and separate estates of Solomon S. Bigelow and Moore Smith, partners, on an account annexed, for many days' work done and materials found by them in building a dwelling-house for the defendant.

The defendant in his answer required the plaintiff to prove that Bigelow & Smith performed the labor and furnished the materials; alleged that he had paid the plaintiff's claim; claimed to set off a promissory note made by Bigelow to Alfred G. Woodward, and by him indorsed to the defendant, before the commencement of the proceedings in insolvency; and alleged "that he never employed Bigelow & Smith to labor by the day; but that he employed said Bigelow to work for him by the day; that said Bigelow, before said labor was performed, agreed to perform said labor in payment of said note of defendant; and that said labor and materials declared on by the plaintiff was performed and were furnished under an express agreement with said Bigelow that the same were to be set off against the defendant's said note."

Trial before *Metcalf*, J., who made a report thereof, of which the pleadings were made part, and the residue of which was as follows: "The defendant offered evidence to show that the contract for building said house was made by him with Bigelow, in the absence of Smith, and that Bigelow then agreed with the defendant to appropriate to the payment of said note, from the price for building said house, as much as he should be able,

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after receiving enough in money from the defendant 'to give him (Bigelow) a support while the work was being done;' and that this was the only agreement made by the defendant for the building of said house — no contract having been made by him with Bigelow & Smith.

"But as it was in evidence, and not denied by the defendant, that both Bigelow and Smith worked on said house, and that the defendant knew that they were partners in the business of building houses; and that he had, a short time before said alleged agreement with Bigelow, contracted with them, as partners, for building another house for him, which they built accordingly; and as it appeared that if such an agreement with Bigelow alone, as the defendant offered to prove, was in fact made, it was not authorized, assented to or known by said Smith; the judge ruled, that evidence of such agreement would not, though it were believed by the jury, furnish a defence to the plaintiff's claim, nor warrant a set-off of said note against said claim, and that it was therefore inadmissible.

"The parties thereupon agreed to submit to the jury the following question: 'Whether in the contract, under which said house was built, said Bigelow agreed with Brimhall that he would appropriate, from his portion of the price for the labor upon the house, as much as he should be able, towards the payment of the $950 note?' To this question the jury returned a negative answer; and they found a verdict for the plaintiff.

"If any error, prejudicial to the defendant's legal rights, was committed at the trial, he is to have a new trial; if not, judgment is to be rendered on the verdict."

G. F. Hoar & J. H. Hill, for the defendant. 1. The defendant should have been allowed to set off his note. In actions brought by the assignees of insolvent debtors, the defendant is not confined to the right of set-off usually allowed in actions at law, but may set off any claim, legal or equitable, which he has against the fund which the assignee represents. *Ex parte Flint*, 1 Swanst. 30. *Ex parte Prescot*, 1 Atk. 230.

It is well settled that a separate debt due from the estate may be set off against a joint debt to it. *Tucker* v. *Oxley*, 5 Cranch

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34. *Ex parte Hanson*, 12 Ves. 346. *Slipper* v. *Stidstone*, 5 T. R. 493. The most convenient practical rule is to consider the fund represented by the assignee as a unit, and to strike a balance, to be proved against the estate, or recovered by the assignee. If the principle claimed by the plaintiff is adopted, it may follow that a portion of the money collected of the defendant will be paid into the private estate of the partner, from which the defendant will receive only a dividend. If the defendant were in bankruptcy, on the authorities cited above, the assignee might set off these very debts; or Bigelow & Smith might do so, if solvent. This right must be mutual.

At any rate, the defendant may set off this claim against so much of the debt due Bigelow & Smith as shall belong to Bigelow's private estate after the partnership debts are paid. The assignee therefore cannot recover in this action without first showing that the whole of it, or how much of it, will be needed to pay partnership debts. 1 Cooke Bankr. Law, 557.

2. The evidence rejected by the court was not offered to establish a contract by one partner, in behalf of the firm and binding upon them, to expend partnership labor in payment of a private debt. It was to show that the defendant never contracted with the firm, and that he never made any contract which rendered him liable on a *quantum meruit*. Bigelow might well contract to build a house for the defendant in payment of his private debt, and this contract, when executed, would be valid, and would give no right of action, even if Bigelow was then a member of a firm, and procured the house to be built by such firm, and even if this agreement was not known to his partner.

It does not appear that the defendant was a party to any fraud upon the partnership articles; nor does it appear that the defendant knew that partnership labor was expended on the house, or on what terms Smith was working, or that the terms of the partnership extended to the time when this contract was to be performed, or prohibited either partner from doing similar business on his own account, or that Smith was ignorant of the terms of his contract.

Suppose an action had been brought by Brimhall against the

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firm for a failure to build the house according to the contract, and Smith had shown in defence the facts offered in evidence at the trial, namely, that the plaintiff never made any contract with the firm, and that Bigelow undertook to contract in his own behalf, and to do the work in payment of a private debt; could Smith be held on such facts?

F. H. Dewey, for the plaintiff.

Bigelow, J. 1. The decisive objection to a set-off by the defendant, of a debt due to him from one of the firm, against a debt which he owes to the insolvent copartners, is that it contravenes the rule of distribution of the property of insolvent debtors among their joint and several creditors, established by *St.* 1838, *c.* 163, § 21. A debt due to a firm constitutes a part of their joint assets, and to allow a private debt due from one of the copartners to be set off against it would be to appropriate a part of the joint estate to pay a private debt. The effect of it would be, not only to give a private creditor of one of the firm, who happened to be a debtor of the copartnership, a preference over other creditors, but, in many cases, to absorb a large amount of the joint assets for the benefit of separate creditors.

2. The other ground on which the defendant seeks to maintain his set-off is not tenable. The principle is well established, that any appropriation of the credit, assets or property of a copartnership in payment of the separate debt of one of the firm, without the knowledge or assent of the copartners, is a fraud on the firm, and cannot be enforced against them. Thus it has been held, that a note given by one copartner, in the name of the firm, for his private debt, without the knowledge or assent of his copartners, is not binding on the firm. It is a fraudulent appropriation of the credit of the firm. So too an agreement, by a member of a firm, to sell partnership property in payment or discharge of his private debt, without the assent, express or implied, of the other members of the copartnership, is deemed fraudulent and void as against the firm, because it is an agreement to appropriate the common property in payment of a separate debt. In like manner, and for the same reason, the set-off of a debt due to the firm against a debt due to one of the copartners, if not known

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or assented to by the other members of the firm, is not binding on the copartnership. *Chazournes* v. *Edwards*, 3 Pick. 5. *Rogers* v. *Batchelor*, 12 Pet. 221. *Dob* v. *Halsey*, 16 Johns. 34. *Evernghim* v. *Ensworth*, 7 Wend. 326. Collyer on Part. §§ 494, 498, 500, 501. The only qualification of this doctrine is, that if the agreement to set off a debt due to a firm against a debt due from one of the copartners is executed, an action *ex contractu* cannot be maintained in the name of the firm to recover the debt which has been thus fraudulently discharged by one of the copartners. *Homer* v. *Wood*, 11 Cush. 62.

The case at bar seems to us to come within the general principle above stated. The insolvent debtors were members of a firm established to carry on a business in which the personal services and labor of both copartners constituted the main and essential feature of the copartnership. In all matters coming within the scope of the business of the copartnership, the services of both copartners belonged to the firm. They were, in a certain sense, the capital stock by which the business of the firm was to be created and carried on, and out of which the joint property, profits and credit were to arise. Each copartner had a right to claim that the services of his copartner should be devoted to the business of the firm. Any agreement, therefore, by one of them, to appropriate the services of the copartner, which were to be rendered within the scope of the business of the firm, in payment of his separate debt, without the knowledge or assent of his copartner, was just as much a violation of the contract of copartnership and a fraud on the firm, as if the joint property or securities had been appropriated in like manner.

In this case, it appears by the evidence that the services which were to be rendered to the defendant were directly within the scope of the business of the firm; that the defendant knew this; that the work was actually performed by the copartners, so as to create a joint debt to the firm; and that the agreement by one of the firm with the defendant, to set-off his private debt against the debt which would accrue to the firm by the work and labor to be performed by both copartners, was made without the knowledge or assent of the other copartner. Such an agree-

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ment was clearly one which operated as a fraud on the copartnership. It was an agreement to make a direct appropriation of that which belonged to the firm to the payment of a private debt of one of the copartners, and it cannot be set up as a valid contract in defence to the claim for services rendered by the firm.

It was strenuously urged by the counsel for the defendant, that it did not appear that the defendant was cognizant of any facts which would make the agreement to set off his private debt a fraud on the copartnership, and that, in the absence of such proof, the true inference was that he acted in good faith, and was therefore entitled to the benefit of his contract for the set-off of his private debt. But this argument is founded on a misapprehension of the rule of evidence applicable to such contracts. Whenever it is made to appear that the credit, property or assets of a firm have been applied by one copartner in payment of his separate debt, it is incumbent on the creditor to show that he acted in good faith, and without any knowledge of the fraudulent nature of the act of the copartner with whom he dealt. If a private creditor takes partnership notes, securities or property in payment of his separate debt, or agrees with one copartner to set off his private debt against a debt due to the firm, it is *prima facie* a misappropriation of partnership property or assets, and it is not necessary for the copartnership to prove that the creditor knew at the time that it was a fraud on the firm. The fact of such application of partnership property and assets to the payment of a private debt is sufficient to put the creditor on his guard, and renders it necessary for him to show that he acted in good faith and without any knowledge of the fraud. Such is the rule stated in the authorities above cited, and in Story on Part. §§ 132, 133.

In the present case, the defendant knew of the copartnership, and of the nature of the business carried on by the firm, and that the work which was to be done for him was within the scope of that business. *Prima facie*, it was work to be done by the copartnership, and the agreement to set off his private debt for the work to be performed by the firm was *prima facie*

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a contract for the misappropriation of that which he knew belonged to the firm, to pay the separate debt of one of the copartners. As this was done without the knowledge or assent of the other copartner, it was evidence of a fraud on the firm, and as the defendant offered no evidence to rebut this *prima facie* case which the plaintiffs had established, he failed to maintain his set-off. *Judgment on the verdict.*

DANA H. FITCH & others *vs.* SAMUEL P. HARRINGTON & others.

An agreement between one partner and a third person that the latter shall participate in that partner's share of the profits of the firm, as profits, renders him liable as a partner to the creditors of the firm, although, as regards the other members of the firm, he is not their copartner.

The acts and declarations of a person not a partner are not admissible to charge him as a partner, without showing that they were brought home to the plaintiff's knowledge.

ACTION on a promissory note signed by the name of Whittemore, Harrington & Co. Trial before *Metcalf*, J., who signed this bill of exceptions:

"Samuel P. Harrington alone made defence; and the only question was, whether he was liable, as a partner, with the other defendants.

"It was in evidence that the firm of Whittemore, Harrington & Co. was formed in July 1856, and carried on business until the latter part of October 1857, when they stopped payment; and that the notes in suit were given for articles used in the business of the firm.

"The plaintiffs introduced evidence tending to show that Samuel P. Harrington was a member of said firm, as between the partners themselves; that the share in the concern, standing in the name of Leonard Harrington (one of the members of the firm) was owned jointly by Leonard and Samuel P. Harrington; that Samuel P. held himself out to the plaintiffs, expressly, and also to the public at large, as one of the partners in the firm;

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and that the plaintiffs gave credit to Whittemore, Harrington & Co. under the belief that he was a partner.

"The defendant Samuel P. Harrington introduced evidence tending to show that he was not a partner in the firm; that he had not held himself out as such to the public at large, nor to the plaintiffs; that he had no interest in the share of the concern standing in the name of Leonard Harrington; and that he was not known nor recognized as a partner by the members of the firm.

"The plaintiffs requested the court to instruct the jury, that although Samuel P. Harrington was not known, by the members of the firm generally, to be a partner, yet if the share in the partnership concern, which share stood in the name of Leonard Harrington only, was owned jointly by Leonard and Samuel P., and Samuel P., as between him and Leonard, was entitled to the profits, if any, which might be derived from that share, he (Samuel P.) was a partner in the firm, as to the plaintiffs, and liable to them in this action; that if he held himself out as a partner in the firm, under such circumstances as to induce the plaintiffs to give credit to the firm under that belief, though he was not in reality a partner, he was still liable to them as such; and that his acts and declarations, if made publicly, though not brought to the knowledge of the plaintiffs, were competent evidence that he so held himself out, and thereby induced the plaintiffs to give credit to the firm, under the belief that he was a partner.

"The court declined to give instructions in the terms requested; but instructed the jury as follows: That if Samuel P. Harrington was a member of the firm, when the notes in suit were given, he was liable in this action, whether the plaintiffs then knew or did not know that he was a partner, or whether they did or did not give credit to the firm on the belief that he was a partner; that if he was not a member of the firm, yet, if by his acts and declarations, which were brought home to the knowledge of the plaintiffs, he led them to believe that he was a member of the firm, and to give credit to the firm in that belief, he was liable to them in this action; that his acts and declara-

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tions to persons other than the plaintiffs were evidence for the jury to consider, in determining the question whether he was a member of the firm; but if such acts and declarations did not satisfy the jury that he was a member of the firm, then they were not evidence which would render him liable to the plaintiffs, unless knowledge of them was brought home to the plaintiffs, and induced them to give credit to the firm in the belief that he was a member of the firm; that if the share in the partnership concern, which share stood in the name of Leonard Harrington only, was owned jointly by him and Samuel P. Harrington, then Samuel P. was liable in this action; but if there was a subpartnership between Leonard and Samuel P., by which Samuel P. was to share in the profits of the firm, to which profits Leonard was entitled, this alone would not make Samuel P. liable for the debts of the firm.

"The jury returned a verdict for the defendant, and the plaintiffs excepted to the instructions given to the jury."

T. L. Nelson, for the plaintiffs. If Samuel P. Harrington conducted himself in a manner to justify the community in the belief that he was a member of the firm of Whittemore, Harrington & Co., he should be held responsible to parties dealing with them under that belief, though derived, not from express personal knowledge of the particular conduct, but from the general knowledge and understanding of the community. Under the older decisions, it was sufficient to show admissions and acts, without bringing them home to the knowledge of the creditor. But the more recent cases go no further than to hold, that in order to incur the responsibilities of a real partner, the defendant must be shown to have held himself out as such to the creditor himself, or under circumstances to satisfy the jury that the creditor knew of it, and believed him to be a partner. Here the evidence tended to show that the defendant held himself out to the public at large as one of the firm, and that the plaintiffs dealt with them under that belief; and the question, whether the conduct of the defendant justified this belief, should have been left to the jury, to be considered by them under all the circumstances of the case. The rule contended for is founded upon

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principles of general policy, to prevent the extension of unsound credit, and to prevent persons who may deal with the firm from being defrauded or deceived. Collyer on Part. § 86. Story on Part. §§, 64, 65. *Young* v. *Axtell*, cited in 2 H. Bl. 242. *Waugh* v. *Carver*, 2 H. Bl. 235, and notes thereto in 1 Smith's Lead. Cas. 507, 508. *Dickinson* v. *Valpy*, 10 B. & C. 128. *Shott* v. *Strealfield*, 1 M. & Rob. 9. *Fox* v. *Clifton*, 6 Bing. 776. *Doubleday* v. *Muskett*, 7 Bing. 117. *Hicks* v. *Cram*, 17 Verm. 449. *Benedict* v. *Davis*, 2 McLean, 347. *Smith* v. *Smith*, 7 Foster, 205–209. Chit. Bills, (10th Amer. ed.) 39.

The instructions on the third point are erroneous in law. If by an arrangement with Leonard Harrington, Samuel P. Harrington was to share in the profits of the business, and had an interest in the profits, as profits, he is a partner as to creditors. *Blanchard* v. *Coolidge*, 22 Pick. 151. *Denny* v. *Cabot*, 6 Met. 90. *Bond* v. *Pittard*, 3 M. & W. 357. 3 Kent Com. (6th ed.) 52. Collyer on Part. §§ 10, 194. *Goddard* v. *Hodges*, 1 Cr. & M. 33. *Coope* v. *Eyre*, 1 H. Bl. 37. *Saville* v. *Robertson*, 4 T. R. 725. *Glassington* v. *Thwait*, 1 Sim. & Stu. 124. 1 Dan. Ch. Pr. 240–250. Story Eq. Pl. § 72. Story on Part. § 34. *Brown* v. *De Tastet*, Jac. 284, and *Raymond's case*, cited in 2 Rose, 255, on which Collyer on Part. § 194, relies, only show that a subpartner is not a member of the general partnership as regards the other partners.

F. H. Dewey, for the defendant. The instructions given to the jury were correct. Samuel P. Harrington's acts and declarations were not admissible in evidence to charge him in this action, unless knowledge of them were brought home to the plaintiffs.

A subpartnership may be defined to be an agreement whereby a member of the firm shares his proportion of the profits, after he has received them, with another person, not a member. This would not make Samuel P. Harrington liable as a member of the firm. A partner may enter into a subpartnership with a stranger; the stranger may share the profits of the particular partner with whom he contracts, and not be liable for the debts of the general partnership. Collyer on Part. § 194. *Brown*

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v. *De Tastet*, Jac. 284. Samuel P. Harrington was not liable because he shared with L. Harrington his part of the profits. Story on Part. § 43. *Turner* v. *Bissell*, 14 Pick. 192. *Cutler* v. *Winsor*, 6 Pick. 335. It is well settled, in whaling voyages, that when the master and crew receive their pay out of the proceeds of the oil, they are not to be regarded as partners with the owners. Agreements that the manufacturer of cloth should receive a certain portion of net profits does not make him a partner. *Denny* v. *Cabot*, 6 Met. 82. There must be a sharing of losses, as well as of profits, to constitute a partnership. *Vanderburgh* v. *Hull*, 20 Wend. 70. *Burckle* v. *Echart*, 1 Denio, 337. When a person is not, as between the members of the firm, a partner, he shall not be considered such as to third persons, if the transaction admits of a different interpretation. Story on Part. §§ 30, 33, 37 & notes. Collyer on Part. § 19. *Loomis* v. *Marshall*, 12 Conn. 69. *Turner* v. *Bissell*, 14 Pick. 192.

METCALF, J. We are all of opinion that the plaintiffs are entitled to a new trial, for the reason that the instruction respecting a subpartnership between Leonard Harrington and Samuel P. Harrington, given, as it was, without any explanation, may have misled the jury. That part of the instructions was given on the authority of Collyer on Partnership, (3d ed.) § 194, which was cited by the defendants' counsel at so late a stage of the trial, that the court had no opportunity to examine the position there laid down, which is thus: "Although the *delectus personæ*, which is inherent in the nature of partnership, precludes the introduction of a stranger against the will of any of the copartners, yet no partner is precluded from entering into a subpartnership with a stranger; *nam socii mei socius, meus socius non est.* In such case, the stranger may share the profits of the particular partner with whom he contracts, and, not being engaged in the general partnership, will of course not be liable for their debts."

The only decided cases which Mr. Collyer cites, in support of this position, are that of *Sir Charles Raymond*, referred to by Lord Eldon, in *Ex parte Barrow*, 2 Rose, 255, and that of *Brown* v. *De Tastet*, Jac. 284. In the case in 2 Rose, Lord

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Eldon said: "I take it to have been long since clearly established, that a man may become a partner with A., where A. and B. are partners, and yet not be a member of that partnership which existed between A. and B. In the case of Sir Charles Raymond, a banker in the city, a Mr. Fletcher agreed with Sir Charles Raymond, that he should be interested so far as to receive a share of his profits of the business, and which share he had a right to draw out from the firm of Raymond & Co. But it was held, that he was no partner in that partnership, had no demand against it, had no account in it, and that he must be satisfied with a share of the profits arising and given to Sir Charles Raymond." In the case in Jacob, it was decided that where one of several partners had agreed with a third person to give him a moiety of his share in the concern, the court of chancery might decree an account between them, without making the other partners parties to the bill. These cases show this only: That as between the members of the firm, *inter sese*, Mr. Fletcher, in the first case, and the third person in the other case, were not copartners. They decided nothing as to the liability of either of them to the creditors of the existing firm.

But Mr. Collyer also cites 2 Bell Com. 636, where it is said: "There may be a subcontract, by which a stranger may be admitted to divide with any of the partners his share of the profits. The other partners are not bound to take notice of this subcontract; nor is there any responsibility attached to it, by which the stranger, as sharing in the profit of the concern, becomes liable for the debts of the partnership." Erskine's Institutes, and the case of *Fairholm* v. *Majoribanks*, decided in Scotland in 1725, are cited in support of this position. In looking at 3 Ersk. Inst. (ed. of 1828,) §§ 21, 22, we find that nothing is there said concerning the liability of such stranger for the debts of the partnership. Mr. Erskine says, "if any of the partners shall assume a third person into partnership with him, such assumed person becomes partner, not to the company, but to the assumer." We have not seen the report of *Fairholm* v. *Majoribanks*. But Mr. Stark cites that case and Erskine's Institutes, in support of the following passage in his work on partnership

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"Subcontracts between partners and other persons, by which a beneficial interest in the partnership is granted, do not create new partners. The partner himself remains alone liable to company creditors." He adds a quotation from the Digest, which is silent, however, as to such other persons' liability for the debts of the partnership. Stark on Part. 155. It would seem, therefore, that the Scotch writers, Mr. Bell and Mr. Stark, have stated the doctrine which Mr. Collyer has repeated, only as an inference of their own from the established law, that such a subcontract as those writers mention, between one member of a firm and a stranger, does not make the stranger, as between him and the firm, their copartner; and hence that the law of Scotland, as to such stranger's liability for the debts of the firm, may not differ from the law of England and of this country. Indeed, it is hardly to be supposed that it was decided in *Fairholm* v. *Majoribanks*, that such a stranger was not liable for the debts of the firm in a case in which, by the English law and ours, he would have been liable. For both Mr. Bell and Mr. Stark, as well as Mr. Collyer, correctly state the English law on this point, without an intimation that the Scotch law is different, except by subsequently inserting the passage which the defendants' counsel cited at the trial of the present case. 2 Bell Com. 625, 626. Stark on Part. 137 *& seq.* Collyer on Part. book I. *c.* 1.

Now what is our law and the law of England on this subject? We understand it to be thus: An agreement between one copartner and a third person, that he shall participate in the profits of the firm, as profits, renders him liable, as a partner, to the creditors of the firm, although, as between himself and the members of the firm, he is not their copartner; but if such third person, by his agreement with one member of the firm, is to receive compensation for his labor, services, &c. in proportion to the profits of the business of the firm, without having any specific lien on the profits, to the exclusion of other creditors, he is not liable for the debts of the firm. *Denny* v. *Cabot*, 6 Met. 90–94. *Bradley* v. *White*, 10 Met. 305. *Holmes* v. *Old Colony Railroad*, 5 Gray, 58. *Burckle* v. *Echart*, 3 Comst. 132. 3 Kent Com. (6th ed.) 33 *& seq.* Parsons Merc. Law, 168, & note.

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In order to enable the jury to decide whether Samuel P. Harrington was liable for the debts of the firm of Whittemore, Harrington & Co. by reason of a subpartnership between him and Leonard Harrington, they should have received instructions more definite and discriminating than they could derive from the mere words of Mr. Collyer. The kind of agreement which would render Samuel P. liable for the debts of the firm, and the kind of agreement which would not render him liable therefor, should have been so explained to them that they might intelligently decide whether the agreement between the two (if any was proved) was such as did or did not render Samuel P. liable as a partner, for the debts due from the firm to the plaintiffs.

The other instructions given to the jury seem to us to have been unexceptionable. *New trial granted.*

FITZROY WILLARD & others *vs.* HENRY D. STONE.

No appeal lies to this court from the decision of the court of common pleas upon a demurrer to a plea in abatement.

ACTION OF CONTRACT. Plea in abatement, and demurrer thereto, which was sustained by the court of common pleas, and the defendant appealed.

G. F. Verry, for the defendant.

G. F. Hoar, for the plaintiffs.

THE COURT, on the ground that no appeal lay from a judgment of the court of common pleas upon a plea in abatement, (*St.* 1840, *c.* 87, §§ 4, 5; *Bartol* v. *Stanwood*, 7 Cush. 116,) dismissed the appeal, and remitted the case to the superior court for further proceedings.

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Artemas Lee *vs.* Inhabitants of Templeton.

A person who has paid his tax within the time prescribed by the town, and thus obtained a discount thereon, under the Rev. Sts. c. 7, § 85, cannot maintain an action against the town to recover back the amount, upon the ground that the tax was illegal by reason of too small a portion of the state tax having been assessed on polls; even if he paid under protest.

Action of contract to recover back moneys paid to the defendants' collectors of taxes in 1854, 1855, 1856 and 1857, for taxes which were illegally assessed by reason of not assessing a sufficient proportion of the state tax upon polls. Trial before *Metcalf*, J., who ruled that on the evidence the payments by the plaintiff were voluntary, and could not be recovered back; and made a report of the case to the full court, of which the votes of the town, copied in the margin,* were made part, and so

* 1853. March 7th. Voted, That a discount of six per cent. be made on all taxes voluntarily paid to the collector on or before the last day of September next, and the collector be instructed to collect all the taxes committed to him to collect, by the 1st day of February next.

1854. March 6th. Voted that the discount for the prompt payment of taxes shall be the same as last year, and that all taxes be collected and paid by the 1st day of February next.

1855. April 2d. Voted, that, to provide for the more effective and economical mode of collecting the taxes and managing the funds of the town, the conditions and restrictions on which the taxes be disposed of for collection the current year to whomsoever may be designated by the town as collector, irrespective of the compensation to be paid for the same, shall be as follows: The collector shall guaranty the collection and the payment, to the treasurer of the town, of all taxes committed to him to collect, except in such cases of loss as may arise from circumstances not within his control, or not chargeable to any fault or delinquency on the part of said collector, or in cases where there is cause for abatement, and the assessors or the town do so abate.

Second. Voted that all taxes paid or collected on or before the last day of September shall be allowed a discount of six per cent. same as last year; and that all taxes, to the amount of one dollar or over, paid or collected prior to the 25th day of September next, shall be allowed the rate of legal interest from the time they are so paid to the 25th day of September, and the collector shall keep an account of all such interest.

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much of the residue of which as is material to the understanding of the point decided is stated in the opinion.

C. Devens, Jr. & G. F. Hoar, for the plaintiff, contended that neither the statute, nor the votes of the town, imposed any condition on the plaintiff of waiving his right to take advantage of any defects in the tax, or took away the right of the town to enforce immediate payment; and cited Rev. Sts. *c.* 7, §§ 27, 35; *c.* 8, § 12; *Goodrich* v. *Lunenburg*, 9 Gray, ; *Boston & Sandwich Glass Co.* v. *Boston*, 4 Met. 187, 189; *Amesbury Woollen & Cotton Manuf. Co.* v. *Amesbury*, 17 Mass. 461; *Preston* v. *Boston*, 12 Pick. 7; *Appleton Bank* v. *McGilvray*, 4 Gray, 518; *Libby* v. *Burnham*, 15 Mass. 144; *Lincoln* v. *Worcester*, 8 Cush. 59; *Sumner* v. *First Parish in Dorchester*, 4 Pick. 365; *Wright*

Third. All taxes received by the collector as aforesaid, except state, county and school district taxes, shall be paid over to the treasurer on the 1st and also on the 15th day, respectively, of each and every month after the tax bills or lists are committed to his hands by the assessors, unless the said 1st and 15th days come on Sunday, in which case the taxes shall be paid over as aforesaid on the following Monday; and at any time when required by the treasurer, the collector shall exhibit his bills or lists showing the amount so collected on the 1st and 15th days of each and every month, and the treasurer is authorized to call on the collector for the payment of all taxes received by him at the time aforesaid; and the treasurer shall also be required to render to the selectmen, on the annual settlement of his accounts, all interests which he may have received on surplus moneys in his hands loaned out, if any, or all interests which may be due on moneys used by himself, if any.

Fourth. The collector shall be required to collect and pay over all taxes committed to him, on or before the 1st day of February next: *Provided however*, that nothing contained in the foregoing conditions and restrictions shall be construed into any hindrance or restriction to the collector's proceeding to the collection of taxes agreeable to the provisions of law, and for his security as guarantor.

1856. April 7th. Voted that a discount of six per cent. be made to all persons who pay their taxes on or before the 30th day of September next; and that the taxes be collected and paid over on the basis adopted in 1855, with the exception of the interest clause; and that all the taxes be collected and paid by the 1st day of February 1857.

1857. March 2d. Voted that all taxes paid on or before the 30th day of September next, shall be allowed a discount of six per cent. and all taxes shall be collected on or before February 1st 1858.

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v. *Boston*, 9 Cush. 242; *Perry* v. *Dover*, 12 Pick. 215; *Shaw* v *Becket*, 7 Cush. 442; *Dow* v. *First Parish in Sudbury*, 5 Met. 73; *Newdigate* v. *Davy*, 1 Ld. Raym. 742; *Close* v. *Phipps*, 7 Man. & Gr. 586.

P. C. Bacon & P. E. Aldrich, for the defendants, cited *Munt* v. *Stokes*, 4 T. R. 563; *Bize* v. *Dickason*, 1 T. R. 286; *Brisbane* v. *Dacres*, 5 Taunt. 144; *Elliott* v. *Swartwout*, 10 Pet. 137; *New York & Harlem Railroad* v. *Marsh*, 2 Kernan, 308; *Christy* v. *St. Louis*, 20 Missouri, 143; *Smith* v. *Readfield*, 27 Maine, 145; *Sheldon* v. *School District in Suffield*, 24 Conn. 88; *Benson* v. *Monroe*, 7 Cush. 125; *Boston & Sandwich Glass Co.* v. *Boston*, 4 Met. 181; *Joyner* v. *School District in Egremont*, 3 Cush. 572; Rev. Sts. *c.* 7, § 35.

Merrick, J. In the statute regulating and defining the manner in which taxes shall be assessed, it is provided that any town may, at its annual meeting, allow a discount of such sums as they may think expedient, to those persons who shall make a voluntary payment of their taxes within such periods of time as the town shall prescribe for that purpose. Rev. Sts. *c.* 7, § 35. It appears from the records of the town, appended to the report of the judge who presided at the trial in the present case, that the defendants availed themselves of this right and privilege in each successive year for five years, from 1853 to 1857. The votes were not all in the same words, but were all the same in substance and effect. Thus in 1853 it was voted in terms "that a discount of six per cent. be made on all taxes voluntarily paid on or before the last day of September next;" and in 1854 it was voted "that the discount for prompt payment of taxes shall be the same as last year." This was just as intelligible, and just as effectual, as if the object and purpose of the town had been expressed in the language of the vote of the preceding year, or in any other form or in any other terms having the same signification. In the two succeeding years the votes of the town were explicit, that a like discount should be made to all persons whose taxes were paid before the last day of September; and that all other taxes should be collected on or before the first day of February then next following. The

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implication from all these votes is inevitable, that until after the time within which voluntary payments are allowed to be made, and the benefit of the proposed discount be taken advantage of, no coercion was to be resorted to for enforcing an involuntary or unwilling payment of a tax assessed. And this was obviously the understanding alike of the town and of the taxpayers. The former, by their proper officer, forbore to exercise any positive constraint under his warrant; and the assessors, in conformity to the law, posted up, in the discharge of their duty, public notice, in more than one place in the town, of the rate of discount which was to be allowed for prompt and voluntary payments. The plaintiff was among the number of those who voluntarily sought out the collector at the appointed time and place, and, just before the expiration of the time allowed, secured the benefit of the discount to be allowed upon the terms which were proposed to him.

The payment of a tax under such circumstances is necessarily, in view of the provisions of the statute, to be regarded and treated as a voluntary payment. It is so, in substance and effect, declared to be by the express provisions of the statute. The privilege of a discount is given to those persons only who make voluntary payment of the tax imposed upon them. And they who avail themselves of the privilege should not refuse to take also the burden of any consequences which are the necessary or legitimate result of the alternative they have chosen. It is like the acceptance of a deed containing reservations of duties to be performed by the grantee for the benefit of the grantor, which thenceforward become obligatory upon the party who has thus impliedly agreed to submit to them. *Goodwin* v. *Gilbert*, 9 Mass. 510. This is founded upon the principle, than which, it is said, nothing is better settled, that whenever a person receives money or other property, upon certain expressed terms and conditions, to his own use, this is in itself an act by which he is as effectually bound to comply with and perform them as he would be by the most express stipulations. *Carter* v. *Carter*, 14 Pick. 428.

There is nothing in the circumstances attending either of the payments, the amount of which the plaintiff now seeks to

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recover back, which has any tendency to change or qualify the effect which the provisions of the statute, above cited, attribute and assign to the free and voluntary action of a party who seeks to secure the benefit and discount authorized by the votes of the town. It is true that he accompanied his payments with a formal protest; and it appears that in one instance the collector was induced, upon his solicitation, to say that the payment of the tax was demanded. But whether these formalities of demand and protest were actually observed in the present case is quite immaterial, since they could have no influence upon a clear, certain and positive rule of law, or be allowed to vary or diminish the force, significance or effect of the express provisions of the statute. The several payments made by the plaintiff must be held to have the character and effect assigned to them by these provisions. In conformity to the absolute rule thereby established, they must be considered as his voluntary acts, and must be treated by courts of law as having this and no other character. The conclusion to be deduced from the facts disclosed is obvious and unavoidable. It is not contended by the plaintiff that money paid in a manner proved or conceded to be perfectly free and voluntary, and with full knowledge of the facts, can be recovered back from the party who has received it under a claim of right. That, in view of the express provisions of the statute, is the condition in which the plaintiff is placed; his payments to the collector were voluntary payments, and the money is therefore irrecoverable. The rulings of the learned judge who presided at the trial were to this effect; and they must consequently be sustained.

Judgment on the verdict for the defendants.

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Reuben S. Denny *vs.* New York Central Railroad Company.

The proprietors of a railroad, who negligently delay the transportation of goods delivered to them as common carriers, and then transport them safely to their destination, are not responsible for injuries to the goods by a flood while in their depot at that place, although the goods would not have been exposed to such injury but for the delay.

Action of tort for damages to wool of the plaintiff, delivered by him to the defendants as common carriers of merchandise, to be transported from the Suspension Bridge at Niagara Falls to Albany. Trial before *Metcalf*, J., who made the following report thereof:

"It appeared that the wool described in the declaration was received by the defendants at Suspension Bridge, directed to Boston, on the 27th of January 1857, and that it arrived at Albany on the 6th of February following; and, being there in the defendants' freight depot, was submerged by a sudden and violent flood in Hudson River, which caused the alleged injury to the wool. It appeared in evidence, that the time required for transporting merchandise, in the usual course of business, from Suspension Bridge to Albany, was forty eight hours.

"The defendants introduced evidence tending to show that the wool was carried safely and without delay over their route as far as Syracuse, that it was delayed there six days, and was then carried safely and without further delay to Albany, and was there deposited, at the end of their route, in a safe and proper depot, with all due precautions against accident by flood or otherwise; that the delay at Syracuse was caused by the fact that they had not a sufficient number of engines to transport the freight which was ready for transportation; that they provided engines sufficient to meet all usual demands and all exigencies which could be foreseen; that early in January 1857, when they had a large surplus of engines, a season of unusually severe cold commenced, by reason of which cold their engines were broken at the rate of one a day for a fortnight; but that they had

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power enough for their business until the 20th of said January; that the delay at Syracuse was caused solely by the cause above stated, and that they made all proper efforts to forward the freight, and did forward it as fast as they could.

"They also introduced evidence tending to prove that the flood which caused the injury to the wool was occasioned by the lodging of ice in Hudson River, below the city of Albany, which formed a dam across the river, and caused a higher flood in that city than was ever before known; that the water rose four feet in fifteen minutes, and wet the plaintiff's wool, which had been deposited in a depot, as hereinbefore stated; and that the defendants used their best exertions to secure the wool from injury by said flood.

"It was in evidence that the plaintiff received the wool at Boston, after it was injured by the flood at Albany, and sold the same at a less price than it would have brought, if it had not been injured.

"It appeared from the defendants' books, which were introduced in evidence, that the car which contained the plaintiff's wool was detained at Syracuse two or three days longer than the other cars which left Suspension Bridge in the same train on the 27th of January.

"The plaintiff contended, 1st. That the defendants had been guilty of negligence in not forwarding his wool from Suspension Bridge to Albany in a shorter time. 2d. That the wool was not deposited in a proper depot, at Albany, as was shown by its being injured there by water. 3d. That the defendants did not exercise the care required of them by law in attempting to save the plaintiff's wool from injury by the flood.

"The jury received instructions, which were not excepted to, as to the care and diligence required of the defendants, in transporting the plaintiff's wool, depositing it in a depot at Albany, and using their efforts to rescue it from the effects of the flood there. The jury were directed to assess the plaintiff's damages for the injury to his wool, caused by the flood; and were also requested to find specially:

"1st. Whether the defendants were wanting in that degree

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of care and diligence which the law required of them in seasonably transporting the plaintiff's wool from the Suspension Bridge to Albany, and whether the wool was injured by reason of the want of such care and diligence.

"2d. Whether the defendants were wanting in that degree of care which the law required of them in depositing the plaintiff's wool in a proper place, when it arrived at Albany.

"3d. Whether the defendants were wanting in that degree of care which the law required of them, in attempting to save the plaintiff's wool from the injury which it received at the place where it was deposited by them, on its arrival at Albany.

"The jury found a verdict for the plaintiff, assessing his damages at $421.07; and answered the first and third of the above questions in the affirmative, and the second in the negative. If, on these findings of the jury, the defendants are not, for any legal reason, liable for the injury to the plaintiff's wool, the plaintiff is to become nonsuit, or a new trial is to be ordered, as the whole court shall direct; otherwise, judgment is to be rendered on the verdict."

The case was also reserved on a motion of the defendant to set aside the verdict of the jury on the third question, as against the weight of evidence. That motion was, by order of the court, argued first before the judge who presided at the trial, and was granted by him, and the case was then argued before the full court on the questions of law raised by the report.

G. F. Hoar, for the defendants, cited Story Bailm. §§ 122, 509, 515, 526; Angell on Carriers, § 201; *Marble* v. *Worcester*, 4 Gray, 395; *Robinson* v. *Austin*, 2 Gray, 564; *Scovill* v. *Griffith*, 2 Kernan, 509; *Davis* v. *Garrett*, 6 Bing. 716; *Parker* v. *James*, 4 Campb. 112; *Stevens* v. *Boston & Maine Railroad*, 1 Gray, 277; *Morrison* v. *Davis*, 20 Penn. State R. 171; *Waite* v. *Gilbert*, 10 Cush. 177; *Ingledew* v. *Northern Railroad*, 7 Gray, 86; *Sprowl* v. *Kellar*, 4 Stew. & Port. 382; *Hazard* v. *New England Marine Ins. Co.* 1 Sumner, 229; Sewall, J., in *Delano* v. *Bedford Ins. Co.* 10 Mass. 354; *Livie* v. *Janson*, 12 East, 648; *Green* v. *Elmslie*, Peake R. 212; 1 Phil. Ins. §§ 1096, 1132; *Kimball* v. *Western Railroad*, 6 Gray, 542; *Norway Plains Co.* v. *Boston &*

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Maine Railroad, 1 Gray, 263, and cases cited; *Nutting* v. *Connecticut River Railroad*, 1 Gray, 502; *Thomas* v. *Boston & Providence Railroad*, 10 Met. 472, and cases cited.

F. H. Dewey, for the plaintiff, cited 2 Kent Com. (6th ed.) 586–602; Chitty & Temple on Carriers, 83, 158; Angell on Carriers, §§ 163, 164; Story Bailm. § 509; *Davis* v. *Garrett*, 6 Bing. 716; *Oakley* v. *Portsmouth & Ryde Steam Packet Co.* 11 Exch. 618; *Clark* v. *Barnwell*, 12 How. 272; *Williams* v. *Grant*, 1 Conn. 487, 492; *Crosley* v. *Fitch*, 12 Conn. 410; *Campbell* v. *Morse*, Harper, 468; *Fuller* v. *Bradley*, 25 Penn. State R. 120; *O'Conner* v. *Forster*, 10 Watts, 418; *Bowman* v. *Teall*, 23 Wend. 306; *Bracket* v. *M'Nair*, 14 Johns. 170; *Kent* v. *Hudson River Railroad*, 22 Barb. 278; *Wibert* v. *New York & Erie Railroad*, 19 Barb. 36; *Walker* v. *York & North Midland Railway*, 2 El. & Bl. 750; *York, Newcastle & Berwick Railway* v. *Crisp*, 14 C. B. 527; *Wilson* v. *York, Newcastle & Berwick Railway*, 18 Eng. Law & Eq. R. 557 note; *Brandt* v. *Bowlby*, 2 B. & Ad. 932.

Merrick, J. This action is brought to recover compensation for damages alleged to have been sustained by the plaintiff in consequence of an injury to a quantity of his wool delivered to the defendants to be transported for him from Suspension Bridge to Albany. It appears from the report that the wool, directed to Boston, was received by them at the former, and carried to the latter place, and was there safely deposited in their freight depot. But it was not transported seasonably nor with reasonable dispatch. By their failure to exercise the degree of care and diligence required of them by law, it was detained six days at Syracuse, and consequently arrived at Albany so many days later than it should regularly have been there. Whilst it was lying in the defendant's freight depot in that city, it was submerged by a sudden and violent flood in the Hudson River. This rise of the water caused the alleged injury to the wool.

Upon the evidence adduced by the parties at the trial, three questions of fact were submitted to the determination of the jury. It is necessary now to advert only to the first of those questions; for the finding of the jury in relation to the second

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was in favor of the defendants, and the verdict in relation to the third has on their motion been already set aside as having been rendered against the weight of evidence in the case.

In looking at the terms and language in which the action of the jury in reference to the first of these questions is expressed, it would perhaps, at first sight, seem that they had passed upon and determined the precise point in issue between the parties, namely, whether the wool was injured by reason of an omission on the part of the defendants to exercise the care and diligence in the transportation of the wool, which the law required of them as common carriers. If this were so, it would have been a final and conclusive determination. But upon a closer scrutiny of the statements in the report, it appears that the jury, by their answer to the question submitted to them, intended only to affirm, that the defendants failed to exercise due care and diligence in the prompt and seasonable transportation of the wool, and that by reason of this failure and the consequent detention of the wool at Syracuse it was injured by the rise of water in the Hudson, and thereby sustained damage to which it would not have been exposed if it had arrived at Albany as soon as it should have done, because in that event it would have been taken away from the defendants' freight depot, and carried forward to Boston before the occurrence of the flood. And it was upon this ground that the verdict was rendered for the plaintiff. This was so considered by both parties in their arguments upon the questions of law arising upon the report.

It is therefore now to be determined by the court, whether the defendants are, by reason and in consequence of their negligence in the prompt and seasonable transporation of the wool, responsible for the injury which it sustained after it was safely deposited in their depot at Albany. And we think it is very plain that, upon the well settled principles of law applicable to the subject, they are not.

It is said to be an ancient and universal rule resting upon obvious reason and justice, that a wrongdoer shall be held responsible only for the proximate and not for the remote consequences of his actions. 2 Parsons on Con. 456. The rule is

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not limited to cases in which special damages arise; but is applicable to every case in which damage results from a contract violated or an injurious act committed. 2 Greenl. Ev. § 256. 2 Parsons on Con. 457. And the liabilities of common carriers, like persons in other occupations and pursuits, are regulated and governed by it. Story on Bailments, 586. Angell on Carriers, 201. *Morrison* v. *Davis*, 20 Penn. State R. 171.

In the last named case, it is said that there is nothing in the policy of the law relating to common carriers, that calls for any different rule, as to consequential damages, to be applied to them. In that case may be found not only a clear and satisfactory statement of the law upon the subject, but a significant illustration of the rule which the decision recognizes and affirms. It was an action against the defendants, as common carriers upon the Pennsylvania Canal. It appeared that their canal boat, in which the plaintiff's goods were carried, was wrecked below Piper's Dam, by reason of an extraordinary flood; that the boat started on its voyage with a lame horse, and by reason thereof great delay was occasioned in the transportation of the goods; and that, had it not been for this, the boat would have passed the point where the accident occurred, before the flood came, and would have arrived in time and safety at its destination. The plaintiff insisted that, inasmuch as the negligence of the defendants in using a lame horse for the voyage occasioned the loss, they were therefore liable for it. But the court, assuming that the flood was the proximate cause of the disaster, held, that the lameness of the horse, by reason of which the boat, in consequence of his inability thereby to carry it forward with the usual and ordinary speed, was exposed to the influence and dangers of the flood, was too remote to make the defendants responsible for the goods which were lost in the wreck. It was only, in connection with other incidents, a cause of the final, direct and proximate cause by which the damages sought to be recovered were immediately occasioned.

There is so great a resemblance between the circumstances upon which the determination in that case was made, and those upon which the question under consideration in this arises, that

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the decision in both ought to be the same. In this case, the defendants failed to exercise due care and diligence, in not being possessed of a sufficient number of efficient working engines to transport the plaintiff's wool with the usual, ordinary and reasonable speed. The consequence of this failure on their part was that the wool was detained six days at Syracuse. This was the full and entire effect of their negligence, and for this they are clearly responsible. But in all that occurred afterwards there was no failure in the performance of their duty. There was no delay and no negligence in any part of the transportation between Syracuse and Albany, and upon reaching the latter place the wool was safely and properly stored in their freight depot. It was their duty to make this disposition of it. They had then reached the terminus of their road; the carriage of the goods was then complete; and the duty only remained of making delivery. The deposit of the wool in the depot was the only delivery which they were required to make; and having made that, their liabilities as carriers thenceforward ceased. It was there to be received by the owner, or taken up by the proprietors of the railroad next in course of the route to Boston. *Norway Plains Co.* v. *Boston & Maine Railroad*, 1 Gray, 263. *Nutting* v. *Connecticut River Railroad*, 1 Gray, 502. The rise of waters in the Hudson, which did the mischief to the wool, occurred at a period subsequent to this, and consequently was the direct and proximate cause to which that mischief is to be attributed. The negligence of the defendants was remote; it had ceased to operate as an active, efficient and prevailing cause as soon as the wool had been carried on beyond Syracuse, and cannot therefore subject them to responsibility for an injury to the plaintiff's property, resulting from a subsequent inevitable accident which was the proximate cause by which it was produced. It is to the latter only to which the loss sustained by him is attributable.

It follows from these considerations, that the verdict in the plaintiff's behalf must be set aside, and a new trial be had; in which he will recover such damages as he proves were the direct consequence of the negligence of which the defendants may be shown to have been guilty. *New trial ordered.*

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Blackstone Manufacturing Company *vs.* Inhabitants of Blackstone.

A corporation incorporated by the laws of another state, authorized by a statute of Massachusetts to hold real estate here, is taxable, under the St. of 1889, c. 189, § 1, and notwithstanding the Rev. Sts. c. 7, § 10, cl. 2, for stock employed in manufactures in a town in this state where it carries on its business.

Shaw, C. J. This action is brought to recover back the amount of taxes assessed on this corporation during the six years next preceding the commencement of the action, which were paid by the corporation to the collector of taxes of the town of Blackstone, on warrants issued by the assessors of each year, in due form of law, requiring the collector in each year to collect the tax of that year, with the usual clause of distress to compel payment in default of payment by the corporation. A demand for a reimbursement of these sums, as for taxes illegally assessed to the corporation and paid by them, was made by the corporation on the town previously to the commencement of the suit.

It appears by the agreed facts, that the plaintiffs are a corporation chartered by the State of Rhode Island. They are therefore a foreign corporation created by, and having their legal existence in the State of Rhode Island. *Bank of Augusta* v. *Earle*, 13 Pet. 519. It is true that by the comity of states and nations, a foreign corporation, like a foreign individual, may maintain a suit to enforce their rights, in cases where the maintenance of such an action is not contrary to the policy or injurious to the rights of the State, or members of the State, in which it is brought. And so in cases where a foreign corporation has property so situated within the limits and under the jurisdiction of this commonwealth, that it may be attached by the ordinary process of law, a suit may be maintained against such corporation by an attachment of such property, as it might under like circumstances against a foreign individual having property so situated. *Portsmouth Livery Co.* v. *Watson*, 10 Mass. 91 *Peckham* v. *North Parish in Haverhill*, 16 Pick. 274

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It is stated in Minot's Digest, Corporation, VII. pl. 1, as the result of this last case, that no action will lie against a foreign corporation; but it is to be taken with the qualification afforded by the case itself, that the foreign corporation had no attachable property in this state. For the old rule of the common law see *Dutch West India Co.* v. *Moses*, 1 Stra. 612.

But it is urged in behalf of the plaintiffs, that they have become naturalized, or made a Massachusetts corporation, by force of *St.* 1841, *c.* 24. Let us examine it. It provides that the Blackstone Manufacturing Company, a corporation established by law in the State of Rhode Island, is authorized to hold real estate in the town of Mendon, to an amount not exceeding $300,000. It was an enabling act, and this is the whole extent to which power was conferred on them, or asked by the petition on which the act was founded. This renders them no further amenable to the laws of the commonwealth, nor entitled to its privileges, than any other foreign corporation.

Is there then any distinction recognized in the law between a domestic and a foreign corporation? It appears to us there is a broad one. A corporation is created by a charter from the government of the State or country, granted either by a special act of incorporation, or by some other public authority, appointed by law. Its existence, its franchises, powers, capacities, duties and liabilities are created, fixed, limited and qualified, both in action and in time, by the law of the State granting the charter. The law of such state can have no direct extraterritorial jurisdiction. In the State where it is chartered, the law of the State, whether the special act creating it, or the general law, constituting and governing like bodies politic, applies to it in full force as positive law. In any other state, though its existence may be recognized, and its rights protected to a limited extent, it is by the law of courtesy, adopted and acted upon as the law of nations amongst civilized communities.

It appears to us that the law of domicil affords a very good analogy, if not a test, in marking the distinction between a domestic and a foreign corporation. Every man must have some domicil; and no man can have more than one domicil. It may

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often be difficult to determine, on a complicated state of facts, where one's domicil is; yet, when fixed, it determines, to a great extent, his civil and social rights and responsibilities. If there were no distinction between a domestic and a foreign corporation, it would be equivalent to saying that a body, when it is once invested with the power of a corporation in one state, has an equal standing in all others; or in other words, it has no domicil anywhere, or has a domicil everywhere, either of which would lead to extraordinary, not to say absurd, consequences

Could a foreign corporation — say this Blackstone Manufacturing Company — be subject to penalties under the laws of Massachusetts, for not sending to assessors the names of their stockholders? *St.* 1853, *c.* 33. Or, without enumerating a great many specific duties required of domestic corporations, taking one decisive test; could a foreign corporation, though authorized to maintain an action here, and subject to be charged by judicial action, to the extent of their property within the jurisdiction of Massachusetts, be made subject to the insolvent law of corporations, *St.* 1851, *c.* 327? If so, could a like proceeding be commenced in Rhode Island, New Hampshire, Vermont, and New York, if the same foreign corporation had ever brought an action or been sued and had its property attached in such state? It seems to us manifest that such are the consequences to which this view of the question leads, and therefore that it cannot be the true view; but on the contrary, that a corporation, like a domiciled citizen, has certain relations in its home state, other than those which it holds in other states.

We have already said that whilst the special act recognized the existence of this corporation, it recognized them as a foreign corporation, and vested them with a power which would have been unnecessary, had they intended to recognize them as a domestic corporation for all purposes. This special power was to hold real estate; this carried with it, by implication, all powers necessarily incidental; as the power to take and receive, and also to execute and deliver all deeds of conveyance, and maintain and defend all suits, brought by or against them, in relation to the title of any real estate bought or sold by them.

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Being, as a foreign corporation, authorized to purchase and sold lands in Mendon, near Blackstone, they of course became subject to be there taxed for their real estate as non-residents, and the plaintiffs do not dispute the validity of this part of the tax. Then as to the personal estate, unless within the special exception, they are expressly within the provision of St. 1839, c. 139, § 1, that "all stocks in trade, including stock employed in the business of manufacturing, or of any of the mechanic arts, in towns within the State, other than where the owners reside, shall be taxed in those towns, if the owners hire or occupy manufactories, stores, shops or wharves therein," &c. This is decisive that the stock held by the company for the purpose of trade, or employed in the business of manufacturing, should be taxed in the town of Blackstone, unless controlled by Rev. Sts. c. 7, § 10, *cl.* 2. But the court are of opinion that it is not so controlled; this mode of taxation was intended to apply only to domestic corporations, that is, exclusively to corporations deriving their charter from the laws of this commonwealth. The provision was obviously founded on the assumption that as a general fact, not universal, but usual and common enough for practical purposes, the stock of corporations in this commonwealth would be held by citizens of this commonwealth, and therefore it would tend to a more equal taxation, to provide that the value of the stock in such corporations, after deducting the fixed property, should be taxed as the personal property of the holders of its shares, in proportion to the number of the shares so held by each. No such assumption could have been taken, and no such consideration could have existed, in regard to the very few exceptional instances of real and personal property held and used in this state, by a foreign corporation.

Several other questions of some interest were discussed, on which it is not necessary to express an opinion, this being decisive of the present case. *Judgment for the defendants.*

H. Chapin & P. P. Todd, for the plaintiffs.

E. Washburn & G. F. Hoar, for the defendants.

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Edward Denny *vs.* Conway Stock and Mutual Fire Insurance Company.

A policy of insurance was declared upon its face to be "made and accepted in reference to the survey on file at this office;" and was afterwards renewed "upon condition that the application, upon which said policy was originally predicated, shall continue valid and in full force." The policy had been issued upon an application for insurance headed with the name of another insurance company, and signed by the president of that company, who delivered the application to this company, and procured the original policy and the renewal of it; but there was no other evidence that the application was made with the authority or knowledge of the assured. *Held*, that the assured was not bound by the statements in the application, as to the precautions to be taken against fire; nor by representations made by such president, at the time of procuring the renewal, as to the amount of other insurance.

The breach of a warranty on the face of a policy of insurance, not alleged in the answer, nor relied upon at the trial, cannot be taken advantage of at the argument before the full court upon the report of the presiding judge.

Action of contract upon a policy of insurance, numbered 1262, for $5,000 upon the plaintiff's woollen mill in Barre, and the machinery and stock therein. Upon the face of the policy, immediately after the description of the property and the proportion of insurance upon each kind, were these words: "$25,000 insured on same elsewhere in like proportions."

In the body of the policy it was "agreed and declared that this policy is made and accepted in reference to the survey on file at this office, and the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for."

The fourth of said conditions provides as follows: "Applications for insurance must specify the construction and materials of the buildings to be insured, or containing the property to be insured; by whom occupied; whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings, and their construction and materials; whether any manufactory is carried on within or about it; and, in case of goods or merchandise, whether or not they are of the description denominated hazardous or extrahazardous, or included in the memorandum of special rates. And a false description by the

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insured, of a building, or of its contents, or omitting to make known any fact or feature in the risk which increases the hazard of the same, or, in a valued policy, an overvaluation of the same, shall render absolutely void a policy issuing upon such description or valuation. And if any survey, plan or description of the property herein insured, is referred to in this policy, such survey, plan or description shall be deemed and taken to be a warranty on the part of the assured."

The original policy was for one year from the 1st of January 1855, and was renewed yearly "upon condition that the application upon which said policy was originally predicated shall continue valid and in full force." The fire occurred in February 1858.

Answer, that the policy "was made upon the representations contained in the application, a copy whereof is hereto annexed, and the renewal of said policy was made upon the said representations and also upon the representations contained in the letter, a copy of which is hereto annexed; that these representations were made by the plaintiff and by his agent; and that said representations were not true in this, to wit, that there were no ladders such as is described in said application, nor any other ladder affixed to said building equivalent to that described as aforesaid, and there was no watch kept in said building such as is described in said application, and thereby the said risk was greatly increased; and they say there was no other insurance on said property, whereby the defendants were deceived and misled in respect to said risk."

The application annexed to the answer was in the usual form of an application for insurance, headed "Manufacturers' Mutual Fire Insurance Company. The application of ——— ——— for insurance;" containing, among other written answers to printed interrogatories, these: "There is one stationary ladder from the ground to the roof, and another soon to be erected." "A watch is kept constantly in the building." and signed only thus: "I certify that the above is a correct survey of the mill as made by myself. Henry A. Denny, Prest. Wor. Manufacturers' Mutual Ins. Co."

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The letter annexed to the answer was from said Denny, dated "Office of the Mechanics' Mutual Fire Insurance Company, Worcester, 24th December 1855," and addressed to the defendants' secretary, saying: "Do you wish to renew policy No. 1262 on the woollen mill of E. Denny of Barre at same rate? I have recently examined the premises. We shall renew our policy at same rate. Whole amount of insurance $30,000."

At the trial before *Metcalf*, J., the defendants offered evidence that Henry A. Denny applied to their secretary for the original insurance, and that they received from said Denny the application annexed to their answer, before the policy was made, and that the policy was predicated upon it; that the latter annexed to their answer was written by Henry A. Denny, on the 24th of December 1855, and put on the files of the company with the survey, and the subsequent renewals were predicated upon the application and this letter; and that all the renewals were obtained by the plaintiff through Henry A. Denny. But the defendants offered no evidence of any authority to him to act as the plaintiff's agent, except such as might be inferred from his acts and his own statements to them.

They also offered evidence that there never was but one stationary ladder in the building, (though there were other means of putting out fire, which the plaintiff contended were equivalent,) and that for three or four months before the fire the mill had not been in operation evenings or Saturdays, and no watchman had been on the premises while it was not in operation; and that the other insurance on the property, at the date of the policy, was only $12,000, (including $5,000 in the Mechanics' Mutual Fire Insurance Company, which expired on the 8th of May 1856,) $15,000 from the 1st of July 1856, and less and less afterwards until the 1st of January 1858, since which time there had been none but the policy in suit.

The defendants "contended that the policy was forfeited, 1st. By the neglect of the plaintiff to provide two stationary or permanent ladders; 2d. By his neglect to keep a watchman constantly in the mill; 3d. By the misrepresentations in regard to insurance in other offices, especially in regard to the insurance

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in the Mechanics' Mutual Fire Insurance Company, and the foregoing proof that there was no such insurance."

The judge ruled that the evidence offered would constitute no defence to the action; the jury rendered a verdict for the plaintiff, and the case was reserved for the consideration of the full court.

F. Chamberlin, for the defendants. 1. The survey was made part of the contract of insurance by express reference to it in the policy and certificates of renewal. It is therefore immaterial whether Henry A. Denny had authority to make the representations or not, or whether he furnished the survey. *Sheldon* v. *Hartford Fire Ins. Co.* 22 Conn. 235. *Liberty Hall Association* v. *Housatonic Mutual Fire Ins. Co.* 7 Gray, 261. *Barrett* v. *Union Mutual Fire Ins. Co.* 7 Cush. 175. *Kibbe* v. *Hamilton Mutual Ins. Co.* 11 Gray, . *Wilbur* v. *Bowditch Mutual Fire Ins. Co.* 10 Cush. 446. The omission for three years to erect a second stationary ladder was therefore a breach of the contract and fatal. *Gloucester Manuf. Co.* v. *Howard Fire Ins. Co.* 5 Gray, 497. *Bowditch Mutual Fire Ins. Co.* v. *Winslow*, 3 Gray, 415. *Houghton* v. *Manufacturers' Mutual Fire Ins. Co.* 8 Met. 114. *Murdock* v. *Chenango County Mutual Ins. Co.* 2 Comst. 210. 1 Phil. Ins. § 542. So was the failure to keep a constant watch. *Crocker* v. *People's Mutual Fire Ins. Co.* 8 Cush. 79. *Glendale Woollen Co.* v. *Protection Ins. Co.* 21 Conn. 19.

2. The substance of Henry A. Denny's representation as to other insurance was as follows: "Other intelligent insurers have expressed their judgment in favor of insuring this property to the amount of $30,000 at this rate; among others, the company of which I am president will renew their insurance at this rate." It was an affirmation of the good credit of the building among insurers. When he made it, he knew it was insured for only $25,000 in all. When he received the certificate of renewal, seven days later, he knew it was insured for only $20,000 in all, and that his company had not renewed. At the time of the fire the plaintiff could not get insurance elsewhere; and had the defendants known the truth, they would not have insured. An action lies against an insurance company for a false representa-

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tion inducing the plaintiff to insure. *Pontifex* v. *Bignold*, 3 Man. & Gr. 63. And see *Wontner* v. *Shairp*, 4 C. B. 404.

3. The words on the face of the policy, "$25,000 insured on same elsewhere," constituted a warranty that that amount was then insured on the property — which, being false, avoided the policy. See *Forbush* v. *Western Massachusetts Ins. Co.* 4 Gray, 343.

F. H. Dewey, for the plaintiff.

Bigelow, J. The defendants, at the trial of this case, rested their defence solely on these two grounds, 1st. That the plaintiff had failed to comply with certain executory representations and stipulations, concerning the construction and mode of use of the property insured, during the period of time covered by the policy; and 2d. That he had misstated the amount of insurance existing on the buildings at the time of making application to the defendants to insure them.

1. In support of the first ground of defence, and in order to prove the stipulations and representations which it was alleged the plaintiff had violated, the defendants offered in evidence a paper containing a description of the property insured, in the form of questions and answers, as usually made in applications for insurance. But this paper did not on its face purport to have been made by the plaintiff or in his behalf, nor was it signed by him. It was a description of the property by a third person; nor was there any evidence that its contents were assented to or even known by the plaintiff.

The defendants, however, sought to hold him responsible for the statements and stipulations contained in it, by reason of a clause in the policy to the effect that the contract of insurance was made and accepted in reference to a "survey" on file in the office of the defendants, which was to be resorted to in order to explain the rights and obligations of the parties under the contract. The argument was, and it is now again urged, that the plaintiff, having accepted a policy which referred to a survey, is shown to have had constructive notice of the existence of such survey; that he is bound by the stipulations and representations contained in it, and in seeking to enforce the contract is

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estopped to deny that they were made by him or by his authority.

Admitting the soundness and force of this argument, and that the plaintiff is bound by the survey so far as he has recognized and adopted it by accepting the policy, the question still remains to be determined, to what extent such recognition and adoption go. And the answer to this question depends on the proper and legitimate meaning of the word "survey;" because it was of this, and this only, that the plaintiff had notice by the terms of his policy. Upon this point, we think there can be no doubt. In its strict signification, as well as in the broader meaning which it may be supposed to have as applied to the subject matter, it can be taken to import only a plan and description of the present existing state, condition and mode of use of the property. It cannot, by any reasonable construction, be held to signify that any statements or representations of a promissory or executory nature were embraced within it, relating to any contemplated alteration or improvement in the property, or to the mode in which the premises were to be occupied during the continuance of the policy. In this sense, the word appears to be used in the conditions of insurance attached to the policy and forming a part of the contract. The terms "survey, plan and description" are there used as being nearly synonymous.

Such being the true import of the word "survey," we can have no difficulty in ascertaining the extent to which the plaintiff is bound by the representations and stipulations contained in the paper which the defendants offered in evidence at the trial. So far as they are of an executory nature, or relate to the use or occupation of the premises subsequently to the date of the policy, it is clear that the plaintiff is not bound by them. He has neither recognized nor adopted them, nor is he estopped from showing that they are not obligatory upon him. The defendants therefore cannot sustain their first ground of defence by proof that no watchman was constantly kept in the mill, or that ladders were not erected on the buildings. Those were stipulations by which he was not bound.

The condition in the certificates of renewal, "that the applica-

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tion upon which said policy was originally predicated shall continue valid and in full force," cannot enlarge the effect of the original reference in the policy.

2. As to the second ground of defence, based on the alleged misrepresentation concerning the amount of insurance on the property when the policy was issued, it is sufficient to say that there was no evidence at the trial, that any representations on the subject were ever made or authorized by the plaintiff.

3. It was suggested at the argument of the case on the questions raised at the trial and presented by the report of the judge, that the facts in evidence disclosed an additional ground of defence. The policy on its face contains the express stipulation or warranty that twenty five thousand dollars were insured on the property elsewhere; and it appeared at the trial that the amount actually insured was much less than this sum. It is quite probable that this would have been a sufficient answer to the plaintiff's claim, if it had been seasonably insisted on. But we think it is quite too late for the defendants now to avail themselves of it. No such ground of defence was distinctly stated in their answer, nor was it suggested at the trial. They cannot be permitted, in this stage of a cause, to start a new objection to the plaintiff's right to recover, which was within their knowledge at the time of the trial, and of which they did not seek to avail themselves, when the plaintiff had an opportunity to meet it. *Judgment on the verdict.*

Joel R. L. Douglas *vs.* Solomon Shumway.

The owner of land, who sells wood standing thereon, with authority to the vendee to cut it within a certain time, has no lien on the wood for the price, in case of the vendee's insolvency after the wood is cut, and before it is removed.

A mortgage of wood standing on land of the mortgagor is a mortgage of personal property, and a record thereof in the registry of deeds is ineffectual, and an office copy of such record incompetent evidence, although the mortgagor resides out of the State.

Action of tort for the conversion of one hundred and fifty cords of wood. The answer denied the plaintiff's property and

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the conversion; and alleged that the wood was the property of one Benson, and was attached by the defendant, being a deputy sheriff, as Benson's property, at the suit of Richard D. Rawson; and was also taken by the defendant as the agent and by the direction of Rawson, who was "the owner thereof or had a lien thereon for the price." Trial before *Metcalf*, J., who signed this bill of exceptions:

"It appeared that on the 30th of October 1857 Rawson, being the owner of a tract of woodland situate in Douglas in this county, conveyed all the wood thereon standing to Benson by a bill of sale, which stipulated that Benson should have until the 1st of April 1859 to clear the wood and timber from the above described lot. Benson gave therefor his promissory note payable on demand, with interest, for the sum of $400.

"The plaintiff offered to show that on the 17th of November 1857 Benson mortgaged said wood, which was then standing and growing on the land, to the plaintiff, to secure a preëxisting debt. Evidence was offered by him that the mortgage was lost, and he then offered a writing certified by the register of deeds for the county of Worcester to be a true copy of the mortgage. It appeared from said copy, and also by the testimony of the plaintiff, that there was a subscribing witness to the mortgage; and also that the same had never been recorded in any town clerk's office. The plaintiff and Benson were both residents in Connecticut.

"The defendant objected that the copy was not admissible in evidence without first calling the subscribing witness; and further that the certificate of the register of deeds was no evidence of the copy, as the town clerk's office was the proper place to record the same, and that the plaintiff could not claim title under said mortgage, or give the same in evidence without said record. But the presiding judge admitted the copy in evidence, and ruled that the plaintiff was entitled to hold under the same.

"The plaintiff further offered evidence to show that on the 16th of July 1858 Benson sold to him said wood, and hauled twenty cords of it off the lot for him, and delivered to him on Rawson's lot about one hundred cords thereof which then

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remained thereon; and that the defendant afterwards, to wit, on the 2d of September 1858, attached the same as the property of Benson at a suit instituted by Rawson on said note. The plaintiff testified that at time of his purchase he knew that the property was bought of Rawson, and supposed it was not paid for.

"The defendant offered to show that before he took possession of said wood Benson had become insolvent; that he had never paid for the same; that the same had always remained on the land of Rawson; and that he took possession of the same as the agent of Rawson by his direction to assert his vendor's lien thereon. But the presiding judge rejected the evidence.

"The jury found for the plaintiff. To which rulings the defendant respectfully excepts."

The arguments upon the points not decided are omitted.

C. Devens, Jr. & G. F. Hoar, for the defendant. 1. The wood sold still remaining on land of the vendor, his lien upon it for the price still existed. The enforcement of the lien is not a rescission of the contract, but a proceeding under the contract to obtain the price. *Arnold* v. *Delano*, 4 Cush. 33. *Newhall* v. *Vargas*, 15 Maine, 314. This lien would not be divested even by sale of the wood to a *bona fide* vendee; he could take no greater title than the seller. *Houlditch* v. *Desanges*, 2 Stark. R. 337. *Craven* v. *Ryder*, 6 Taunt. 433. *Arnold* v. *Delano*, above cited. The lien on the remainder is not divested by part delivery. *Payne* v. *Shadboldt*, 1 Campb. 427. *Bloxam* v. *Sanders*, 4 B. & C. 941. *Miles* v. *Gorton*, 2 Cr. & M. 504. Story on Sales, § 290. Acceptance of a bill or note does not destroy the seller's lien, if the note be still in his hands; because there is an implied condition that, while the goods remain in the seller's hands, the purchaser shall keep his credit good. *Arnold* v. *Delano* and *Miles* v. *Gorton*, above cited. Story on Sales, § 285. In the present case, the note had become due while the property was in the seller's hands.

2. A sale of standing wood is a sale of personal property only. *Claflin* v. *Carpenter*, 4 Met. 580. *Nettleton* v. *Sikes*, 8 Met. 34. *Nelson* v. *Nelson*, 6 Gray, 385. The instrument of

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November 17th 1857 therefore could only operate as a mortgage of personal property. Delivery of the property or a record of the mortgage in the proper town clerk's office is essential, in order that property should pass by a mortgage of personalty. Rev. Sts. c. 74, § 5. *Travis* v. *Bishop*, 13 Met. 304. *Shapleigh* v. *Wentworth*, 13 Met. 358.

The mortgage being improperly recorded in the registry of deeds, the certified copy from the register should not have been admitted as evidence. The principle on which a certified copy is admitted requires that it should be a certificate from an officer whose duty it was to record the original. 1 Greenl. Ev. § 484–485 & note; § 498. *Scanlan* v. *Wright*, 13 Pick. 523. *Arnold* v. *Tourtellot*, 13 Pick. 172. This is on the same principle that a deed admitted to record without acknowledgment does not operate as notice.

P. C. Bacon & A. Dadmun, for the plaintiff. 1. The conveyance of the wood from Rawson to Benson included a lease of the land upon which it was, for the purpose of cutting the trees, for a time which had not expired when Benson sold the wood to the plaintiff, and therefore Rawson, not being in possession of the land upon which the wood was, could have no lien thereon The sale and delivery to the plaintiff, in good faith and for a valuable consideration, before the defendant took possession to arrest Rawson's lien, would of itself terminate Rawson's right to hold the wood, if he had any. *Arnold* v. *Delano*, 4 Cush. 33. *Tansley* v. *Turner*, 2 Bing. N. C. 151. *Hurry* v *Mangles*, 1 Campb. 452. *Smith* v. *Synes*, 1 Selden, 45. Story on Sales, §§ 308–311, 315, 341. 2 Kent Com. (6th ed.) 545.

2. It was necessary to the protection of the mortgagee, that the mortgage should be recorded in the registry of deeds; for, until severance, the wood was, for many purposes, real estate. The record copy was therefore properly admitted in evidence. As the mortgagor resided out of the Commonwealth, the mortgage could not be recorded in the office of the clerk of the town of his residence.

Bigelow, J. 1. The evidence offered in support of the defendant's claim to a lien as vendor of the wood was rightly

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rejected. The contract of sale contemplated that the vendee should expend labor and money in felling the trees and preparing the wood for market; and the case finds that the wood had been cut by the vendee, and a portion thereof sold by him and hauled off the land. We think these facts are inconsistent with an existing right of lien in the vendor for the purchase money. We know of no case where such a right has been recognized, after the vendee has, at his own expense, in pursuance of the contract of sale, changed the character of the property, and by his own labor and money added to its value. By these acts the vendor must be deemed to have parted with his possession and control of the property. The vendee, by himself and his agents, had taken it into his actual possession, and incorporated with it the labor bestowed by him in preparing it for sale. There was therefore such a change of possession from the vendor to the vendee as to defeat any right of lien in the vendor. Upon this ground, the case is clearly distinguishable from *Arnold* v. *Delano*, 4 Cush. 33.

2. But on another ground we think the verdict must be set aside. A contract for the sale of standing wood, to be cut and carried away by the vendee, is to be construed as passing only an interest in the trees, when they are severed from the freehold. They then pass to the vendee as personal property. *Claflin* v. *Carpenter*, 4 Met. 580. *Nettleton* v. *Sikes*, 8 Met. 34. Under the contract in the present case the vendee acquired no interest in the land. He could not therefore convey any to the plaintiff by his mortgage. His conveyance could only operate to pass the interest which he had acquired in the trees as personal chattels. It follows that the mortgage to the plaintiff was recorded in the registry of deeds without warrant of law, and a copy of it, even if otherwise competent, was not authenticated by any officer having authority to certify it. *Pitcher* v. *Barrows*, 17 Pick. 361. *Blood* v. *Blood*, 23 Pick. 84. It was not therefore competent secondary evidence of the original mortgage which was lost, and should have been excluded at the trial.

New trial ordered.

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President, Directors and Company of the Grafton Bank *vs.* David P. Cox.

If the maker of a promissory note leaves the Commonwealth, abandoning simultaneously both his residence and his place of business here, although his family remain a few months at the former, it is sufficient to charge one who indorsed the note to the plaintiff since the maker absconded, to make a demand at the maker's last place of business, without inquiry at his last residence, or of the indorser, for the maker's present residence.

Action of contract against the indorser of a promissory note, made at Boston by Henry S. Downs. Trial in the court of common pleas, at December term 1858, before *Mellen*, C. J., who ruled that the evidence did not show sufficient diligence in the holders of the note in demanding payment of the maker, and ordered a verdict for the defendant. The plaintiffs alleged exceptions. The facts are sufficiently stated in the opinion.

D. Foster, for the plaintiffs, cited Story on Notes, §§ 235, 240; Edwards on Bills & Notes, 158–160; 3 Kent Com. (6th ed.) 96; *Creamer* v. *Perry*, 17 Pick. 335; *Bank of Columbia* v. *Lawrence*, 1 Pet. 582; *Moore* v. *Coffield*, 1 Dev. 247; *Dennie* v. *Walker*, 7 N. H. 199; *Anderson* v. *Drake*, 14 Johns. 114; *Putnam* v. *Sullivan*, 4 Mass. 45; *Widgery* v. *Munroe*, 6 Mass. 449; *Freeman* v. *Boynton*, 7 Mass. 483; *Boot* v. *Franklin*, 3 Johns. 207; *Miller* v. *Hennen*, 15 Martin, 587; *Lambert* v. *Ghiselin*, 9 How. 552; *M'Gruder* v. *Bank of Washington*, 9 Wheat. 598; *State Bank* v. *Hurd*, 12 Mass. 171; *Gilbert* v. *Dennis*, 3 Met. 495; *Duncan* v. *M'Cullough*, 4 S. & R. 480; *Taylor* v. *Snyder*, 3 Denio, 150; *Shed* v. *Brett*, 1 Pick. 414; *Chapman* v. *Lipscombe*, 1 Johns. 294; *Hepburn* v. *Toledano*, 10 Miller, 643.

G. F. Hoar & I. W. Richardson, for the defendant, cited *Remer* v. *Downer*, 23 Wend. 620, and cases there cited; *Peirce* v. *Pendar*, 5 Met. 352; *Wheeler* v. *Field*, 6 Met. 290; *Bank of Columbia* v. *Lawrence*, 1 Pet. 583; *Tindal* v. *Brown*, 1 T. R. 167; *Colt* v. *Barnard*, 18 Pick. 260; Story on Bills, § 352 *Granite Bank* v. *Ayers*, 16 Pick. 392; *M'Gruder* v. *Bank of Washington*, 9 Wheat. 598; *Taylor* v. *Snyder*, 3 Denio, 145

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Porter v. *Judson*, 1 Gray, 177; *Massachusetts Bank* v. *Oliver*, 10 Cush. 559; *Phipps* v. *Chase*, 6 Met. 491; *Bank of Utica* v. *De Mott*, 13 Johns. 432; *Heylyn* v. *Adamson*, 2 Bur. 669; *Beveridge* v. *Burgis*, 3 Campb. 262.

MERRICK, J. In determining the questions which arise upon the testimony reported in the bill of exceptions, it is conceded by the parties that it is in no respect subject to contradiction or denial, but is to be received and treated by the court as being in all particulars true, and as if it constituted an agreed statement of facts. In this view of the case, it is obvious that the inquiry whether the holder of the note declared on used sufficient diligence to find, and to demand payment thereof of the maker, is a mere question of law. *Wheeler* v. *Field*, 6 Met. 290. At the trial it was held, that they did not; and a verdict was consequently rendered for the defendant.

He attempts to support this ruling, upon the ground that the plaintiff neither presented the note for payment, at maturity, at the maker's last place of abode in this state, nor used due and reasonable diligence to find it. The general rule of law upon the subject is perfectly plain. When the maker of a note has, before its maturity, become insolvent, and has absconded from the State and gone into parts unknown, there must be a presentment and demand of payment at his last place of business or of residence, or due and reasonable efforts to find them for that purpose, in order to fix the indorser and render his liability absolute. Such demand will be sufficient if made at either of those places, if they were both left and abandoned at the same time; but if there be a difference in the time, it should be made at that which was the most recently occupied. In such case, the holder is not required, as an essential preliminary to a claim upon the indorser, to resort to or inquire for the new residence to which the maker has gone beyond the State, into a foreign country. *M' Gruder* v. *Bank of Washington*, 9 Wheat. 598.

At the maturity of the note declared on in this suit, it was placed by the plaintiffs, who were the holders and owners of it, in the hands of a notary public in Boston, for the purpose of demanding payment of it of the maker, and of giving notice to

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the indorser in case it should be dishonored. It is not denied that he made a sufficiently formal demand of payment at the maker's last place of business; but none was made at his last place of abode. The officers of the bank knew where Cox, the indorser of the note, resided, but they did not give any information concerning it to the notary, who neither knew him nor made any inquiries of him in relation to the residence of the maker. If the maker had, at the maturity of the note, resided in Boston, or in the State, or at any place to which the holder would have been bound to resort to demand payment of him, and there was reason to suppose that the indorser had knowledge of such residence, the omission to inquire of him concerning it would have been a failure to use due diligence, and would have had the effect to discharge the indorser from his liability. *Porter* v. *Judson*, 1 Gray, 177.

But it appears distinctly that Downs, the maker of the note, when he failed in business some years before the maturity of the note, immediately left the State, giving up and abandoning both his place of business and his place of residence at the same time. He went customarily, according to the testimony of Ball, to his place of business, "up to the very last." After that he had no place of residence in the State. His family remained at a boarding-house in Malden two or three months afterwards; but that is immaterial, since he himself wholly ceased personally to reside in this state when he left the occupancy of his store in Boston. It does not appear under what circumstances they removed, or whether he made any provision for their support. It was sufficient, therefore, in order to charge the indorser, to make a demand upon him at the store where his business had been pursued up to the last of his continuance in the State. It was unnecessary to present the note for payment at his former place of residence; because that was given up and forsaken simultaneously with his place of business. And as it was for this reason unnecessary to present or demand payment of the note at his dwelling-house or place of residence, there was no occasion for the holders, or the notary who acted in their behalf, to make any inquiry concerning it; and the omission on their

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part to do so could not be considered a failure in the diligence required in order to charge the indorser. Nothing more was requisite for that purpose, under the circumstances disclosed, than that payment should be demanded in the maker's last place of business in Boston. The ruling that this was insufficient must be therefore held to have been erroneous.

The defendant further contended that as the note was transferred and had become the property of the plaintiffs after the maker had failed and left the State, it devolved upon them, in order to establish a claim for the payment of it against the indorser, to institute inquiries concerning his new place of residence beyond the limits of the State, and to use suitable diligence in attempting to discover it. But the law has prescribed no such rule, and of course they were subject to no such duty. Whether there may not be, as was suggested by Mr. Justice Wilde in the case of *Wheeler* v. *Field*, 6 Met. 295, exceptions to this rule, as where the maker, in leaving the State and commencing a new residence in another, is still in the immediate vicinity of his old domicil, need not now be considered, since there is nothing in this case to show that there could be any application of such an exception, or that Downs, when he left Boston, did not go into the most distant portion of the country, or at least into a place wholly unknown to any of his former acquaintance. *Exceptions sustained.*

CALVIN H. RUGGLES *vs.* JOHN BARTON, JR.

A warranty deed from a mortgagee, who has entered upon the land for breach of condition of the mortgage, passes his title, and, though unaccompanied by a transfer or assignment of the mortgage notes, enables his grantee to maintain a writ of entry to foreclose the mortgage, and, on producing and filing the notes, to have a conditional judgment.

WRIT OF ENTRY on a mortgage. At the trial in the court of common pleas, at December term 1858, the demandant offered evidence of these facts:

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On the 1st of April 1850 the tenant executed a mortgage of the demanded premises, to secure the payment of two promissory notes, to William A. Hayward, who on the 4th of August 1851 entered and took possession of the premises, for breach of condition, in presence of two witnesses, but omitted to have a certificate thereof recorded. Hayward remained in possession until the 14th of October 1854, when he conveyed the premises to the demandant by deed of warranty. The mortgage has never been discharged; nor the notes, which it was given to secure, given up or destroyed. No assignment of the mortgage or notes has ever been made, unless by virtue of the deed to the demandant.

Upon this evidence, *Mellen*, C. J. ruled that the action could not be maintained. A verdict was taken for the tenant, and the demandant alleged exceptions.

H. Chapin & T. G. Kent, for the demandant.

P. C. Bacon, for the tenant.

Dewey, J. Upon the facts stated in the present case, the court are of opinion that the deed from Hayward to the plaintiff passed the legal interest of Hayward in the demanded premises to the plaintiff. It was a deed of warranty, and, as such, would pass all the present interest of the grantor. If that was an absolute estate in fee simple, such interest would pass thereby; but if the grantor had a less interest, it would pass that interest. A mere quitclaim deed would have passed the legal interest of Hayward in the mortgage to the plaintiff. *Hunt* v. *Hunt*, 14 Pick. 382. A warranty deed would be not less effectual in passing the mortgage interest, but would also secure to the grantee any title subsequently perfected by the grantor.

The ground of objection principally relied upon, that the plaintiff cannot maintain an action to foreclose such mortgage, inasmuch as the notes secured by the mortgage were not in fact transferred to the plaintiff at the time of his taking the deed from Hayward, cannot avail. It is true that the conditional judgment for foreclosure can only be entered upon proper evidence of the amount of the debt secured by the mortgage

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that remains unpaid, and if the plaintiff was unable to avail himself of the notes secured by the mortgage, he would not be entitled to the conditional judgment upon the mortgage. But those notes have never been given up or in any way discharged or transferred to any third person. The mortgagee, Hayward, has held them as collateral to his mortgage; and, to give effect to his conveyance to the plaintiff, they are now produced in court by the plaintiff, and offered to be filed in the case as the foundation of the conditional judgment. This obviates all the technical difficulty of taking a conditional judgment upon a naked assignment or transfer of the mortgage without the notes.

We think that the verdict that was entered for the defendant should be set aside, and the case remitted for further proceedings; and that upon filing the notes secured by the mortgage, the plaintiff will be entitled to a conditional judgment upon the mortgage.

ROXALANA FARNUM *vs.* FRANKLIN M. FARNUM & another.

A release by A. of all demands against B., reciting a settlement "between A. on the one side and B. and C. on the other," has no legitimate tendency to prove that there was a joint interest or partnership between B. and C. in the same business during that time.

In an action by a mother against two sons for money paid to their use, one of the defendants contended that the money was paid to the sole use of the other; and testified that he asked his mother to give him a note for the amount which he feared he should have to pay for his brother, and she offered to give him a mortgage of part of her farm. *Held*, that evidence of her having in former years paid money for him, and given him the use of the farm, was incompetent to contradict his testimony.

Evidence that the maker of a note put property into the hands of the first indorser has no tendency to show that the latter signed the note for the accommodation of the maker alone, and not of the maker and the second indorser jointly.

An exception to the admission of incompetent evidence is not cured by an instruction to the jury that it is immaterial.

Evidence that two persons were jointly interested in the buying and selling of horses is irrelevant to the issue of their interest in buying and selling cattle; and a statement relating to it, made on cross-examination, cannot be contradicted.

ACTION OF CONTRACT for money paid to the defendants' use Otis Farnum, one of the defendants, was defaulted.

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At the trial in the court of common pleas, at December term 1858, before *Mellen*, C. J., it appeared that in 1851 and 1852 Franklin and Otis Farnum had been engaged jointly, and also each on his own account, in the business of buying and selling cattle, raising money upon their own notes without indorsement; and that in 1853 and 1854 they were both engaged in the same business with E. T. Archbald & Company in the State of New York, and the plaintiff, who was the mother of the defendants, was accustomed to indorse their notes, for their joint benefit and accommodation in carrying on that business.

It appeared that the money sought to be recovered in this action was paid by the plaintiff upon two notes, dated March 9th 1855, signed by Otis and payable to Franklin, indorsed by the plaintiff and then by Franklin, with the expectation of all the parties that the money to be raised thereon would be applied to the purchase of cattle in New York; and that the notes were afterwards protested for nonpayment. Franklin's defence was, that he had no interest in the notes or the money raised thereon, but indorsed the notes at the request and for the sole benefit of Otis; and he proved that Otis sold the cattle which were purchased with the money raised upon the two notes, and took notes for the price, payable to himself alone.

The plaintiff, "for the purpose of showing that the defendants were and did constitute but one party in the joint trade or business of buying and selling cattle, and for the purpose of raising the presumption that there was between the defendants a joint interest or partnership in this business down to the time when the 9th of March notes were made," offered in evidence a release of all demands from "E. T. Archbald & Company" to Otis Farnum, dated April 13th 1856, to which this recital was prefixed:

"Whereas on or about the month of August A. D. 1853 E. T. Archbald and Abel P. Morse, copartners doing business under the name and firm of E. T. Archbald & Co. in Hammond, St Lawrence county and State of New York, and Franklin M Farnum and Otis Farnum, both of Charlton, in the county of

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Worcester and State of Massachusetts, entered into a verbal agreement to become joint dealers in the trade or business of buying and selling cattle, to divide the profits arising therefrom into equal shares and proportions; and since the commencement of said business each of the above named parties has been entrusted by the others with money and joint funds arising from, and necessary for the carrying on of said business; and an account has this day been taken by and between E. T. Archbald & Co. on the one side and Franklin M. and Otis Farnum on the other, and settlement made."

It was admitted that two other similar papers were passed between the parties at the same time; one from Franklin and Otis Farnum to Archbald & Company, and the other from Archbald & Company to Franklin. The presiding judge excluded the paper.

Franklin M. Farnum offered evidence "that in the years 1847, 1848, 1851 and 1855, Otis Farnum had put property of his into the hands and possession of his mother — as tending to show that she signed the 9th of March notes for the sole benefit of Otis, without offering to show that any part of it was applied to the payment of the 9th of March notes." The judge, against the objection of the plaintiff, admitted the evidence; but instructed the jury, that unless the plaintiff applied the proceeds of the property to the payment of the notes the evidence would be immaterial.

It appeared that Otis had lived for the last fifteen years on the farm of his mother in Charlton, paying her nothing for its use except by supporting her, which cost him much less than the value of such use. Franklin testified "that he asked his mother to give him a note for the amount he was afraid he should have to pay for Otis, and she offered to give him a deed of a part of her farm, or a mortgage of it." The plaintiff, "for the purpose of showing the improbability of this testimony, offered to produce memoranda of money which she had paid to Franklin and to his use previously to 1837;" and also offered to show that "she had given to Franklin the use of the farm on which she now lives, for nine years, from 1838 to 1847, on

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the same terms as those on which Otis now lives on it, and that she furnished the stock and tools which were necessary for carrying on the farm, for which she had received nothing from him." But the judge excluded this evidence.

Otis Farnum, who was called as a witness for the plaintiff, was asked, upon cross-examination, several questions about a purchase and sale of a drove of horses in the spring of 1854; (which was a matter which the plaintiff's counsel had not alluded to, nor offered any evidence of;) and replied that his brother Franklin was jointly and equally interested with him in that transaction. At a subsequent stage of the trial, the defendant was allowed, against the objection of the plaintiff, to introduce evidence to contradict this testimony, "on the ground that, the plaintiff having introduced evidence of the joint transactions between them prior to 1855 to raise a presumption that said joint transactions continued in 1855, it was competent for the defendant to show an interruption of the same."

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

P. E. Aldrich & S. P. Twiss, for the plaintiff.

F. H. Dewey & H. Williams, for Franklin M. Farnum.

METCALF, J. The paper signed by Archbald & Company, dated April 14th 1856, and offered in evidence by the plaintiff, was rightly excluded. It was offered "for the purpose of showing that the defendants," F. M. Farnum and O. Farnum, "were and did constitute but one party in the joint trade or business of buying and selling cattle, and for the purpose of raising a presumption that there was between the defendants a joint interest or partnership in the cattle trade or business down to the time when the 9th of March notes were made." We are of opinion that the paper had no legitimate tendency to show such fact, or to raise such presumption. *Frustra probatur quod probatum non relevat.*

The court also rightly refused to receive in evidence the plaintiff's memoranda of money paid by her to F. M. Farnum before the year 1837, and of her having given him the use of her farm for nine years, ending in 1847, on the same terms as those on

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which O. Farnum was living on it at the time of the trial. The facts, thus offered to be proved, were far too remote from the inference proposed to be drawn from them, and would not have warranted that inference, namely, the improbability of F. M Farnum's testimony that he asked the plaintiff to give him a note for the amount which he feared he should have to pay for O. Farnum, &c. There is no natural connection, nor any natural repugnancy, between those facts and the statements made by F. M. Farnum in his testimony. See Best on Ev. §§ 90, 246.

But we are of opinion that evidence of O. Farnum's having put property into the hands and possession of the plaintiff, in the years 1847, 1848, 1851 and 1855, was wrongly admitted for the purpose of showing that she signed the notes of March 9th 1855 for his sole benefit. That evidence, taken by itself, had no more tendency to show that she signed those notes for his sole benefit, than that she signed them for the joint benefit of him and F. M. Farnum. And the remark of the court to the jury, that this evidence would be immaterial unless the plaintiff applied the proceeds of that property to the payment of those notes, (of which there does not appear to have been any proof,) was not sufficient, we fear, to prevent a wrong effect on the jurors' minds from the introduction of that evidence. See *Ellis* v. *Short*, 21 Pick. 142, and *Norris* v. *Badger*, 6 Cow. 455.

We are also of opinion that evidence was wrongly admitted to contradict a statement of O. Farnum, made on cross-examination. That statement related to a matter collateral and irrelevant to the issue on trial, and was evidently drawn from him for the mere purpose of contradicting him. This is not allowable. 1 Greenl. Ev. § 449, and cases there collected. *Rex* v *Rudge*, Peake's Add. Cas. 232. *Exceptions sustained.*

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SARAH F. HARRINGTON *vs.* ADAM HARRINGTON, Administrator.

The wife of a devisee of real estate is not entitled to notice of a petition of the devisor's administrator for license to sell it for the payment of debts, legacies and charges of administration.

APPEAL from a decree of the court of probate, granting a license to the administrator, with the will annexed, of the estate of Micah Monroe, to sell the whole of said Monroe's real estate for the payment of debts, legacies and charges of administration. The reason assigned by the judge for licensing a sale of the whole estate was, that "by the sale of a part thereof, the residue would be greatly injured."

The appellant was the wife of Charles A. Harrington, who was Monroe's residuary devisee and legatee, and who certified in writing his consent to the petition for leave to sell. One reason of appeal was that the appellant "had no notice, actual or presumptive, of the petition for said license, and that the same was granted, recorded and delivered, before she had any knowledge of the same, greatly to the prejudice of her legal and contingent right of dower in the residuum of said real estate, as the wife of said residuary devisee."

Metcalf, J., being of opinion that the appellant had no legal right of appeal from said decree of the probate court, dismissed the appeal, subject to the opinion of the full court.

I. M. Barton, for the appellant. The appellant had a contingent right of dower in the real estate devised to her husband, which right would be utterly defeated by the proposed sale. She was therefore entitled to notice of the petition for the license, and to appeal from the decree granting it. Rev. Sts. *c.* 71, §§ 8, 9; *c.* 83, § 34. *Sewall* v. *Raymond*, 7 Met. 457. *Smith* v. *Bradstreet*, 16 Pick. 264. *Boynton* v. *Dyer*, 18 Pick. 3. *Wiggin* v. *Swett*, 6 Met. 197. *Bryant* v. *Allen*, 6 N. H. 116.

P. C. Bacon, for the appellee.

BIGELOW, J. This case does not fall within any previous decision of this court, relating to the notice to be given to persons

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interested, on a petition to sell the real estate of a deceased person for the payment of his debts. The cases most nearly resembling it are *Smith* v. *Bradstreet*, 16 Pick. 264, and *Boynton* v. *Dyer*, 18 Pick. 1.

The former case was an appeal of a creditor of an heir of a deceased person, who had caused the share of the real estate, which had descended to the heir, to be attached on mesne process. It was held, that he was a person interested and entitled to appeal from a decree allowing the will of the deceased. His interest in the real estate was a present existing lien upon it, by virtue of his attachment, which in due course of law would ripen into a title which would relate back to and take effect from the attachment.

The case of *Boynton* v. *Dyer* was an appeal by the children of a person *non compos*, from a decree allowing the account of a guardian. Their right to appeal was placed on the ground that no person other than the heirs presumptive of a *non compos*, competent to take an appeal, had any interest in the question. It might also be added that they were entitled to notice within the express terms of the statute then in force. By *St.* 1783, *c.* 38, § 4, it was provided that guardians might in certain cases be licensed to sell the real estate of their wards in like manner as the real estate of persons deceased might be sold by executors and administrators. The statute in such cases regarded the ward as civilly dead, and his heirs as persons directly interested in his real estate.

The case at bar is clearly distinguishable from these decisions. The entire legal estate was vested in the devisee, who was competent to take notice of the petition and assent to the same. His wife had no present existing right or interest in the land. Her right was only inchoate and contingent, depending on the event of her surviving her husband. This, we think, was altogether too remote and uncertain a right to entitle her to notice of the petition for sale, as a party interested within the meaning of the statute.

We believe the practice in this commonwealth has been uniform, in cases like the present, to regard the wife of an heir or

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devisee of a deceased person as having no such interest in the real estate which comes to her husband as heir or devisee, as to entitle her to notice of a petition to sell the real estate for the payment of the debts of the deceased. Even if the question were a doubtful one, we should be slow to reverse the settled practice by a decision, which might seriously affect titles to real property heretofore acquired under sales authorized by decrees of the probate court. *Appeal dismissed.*

Joseph Hagan *vs.* Dan Riley.

For breach of an agreement, for good consideration, to withdraw a suit, nominal damages may be recovered, without proof of actual damage.

It seems, that, in an action for breach of an agreement to withdraw another action, the costs of the defendant in that action, if paid by the plaintiff in this, at any time before verdict, may be recovered.

Action of contract for the breach of an agreement in writing, by which the defendant, for a valuable consideration, promised to withdraw an action commenced by him against a constable for attaching certain of his property, (which he claimed to be exempted from all attachment,) in a former action brought by the plaintiff against the defendant. The breach relied on was, that the defendant did not withdraw his action, but entered it in court.

The plaintiff claimed damages for costs and expenses which, he alleged, he was liable to pay the constable, to whom he had given a bond of indemnity. It did not appear that the constable had ever made a demand on the plaintiff to pay him any costs or expenses, in consequence of the entry of the action in court, or that the plaintiff had paid him anything on account of the same; but it appeared that the constable had been put to costs and expenses, amounting in the whole to the sum of about forty dollars, on account of said entry, which he claimed of the plaintiff, and for the payment of which the bond had been given.

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Upon this case, in the court of common pleas, at December term 1858, *Mellen*, C. J. instructed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

S. A. Burgess, for the plaintiff, cited 2 Greenl. Ev. §§ 254, 268, & note; *Preble* v. *Baldwin*, 6 Cush. 557; *Dwinel* v. *Barnard*, 32 Maine, 116; *Bolivar Manuf. Co.* v. *Neponset Manuf. Co.* 16 Pick. 241; *Whipple* v. *Cumberland Manuf. Co.* 2 Story R. 661; *Whittemore* v. *Cutter*, 1 Gallis. 433; *Billings* v. *Vanderbeck*, 23 Barb. 554.

P. P. Todd, for the defendants, cited *Hussey* v. *Collins*, 30 Maine, 190; *Gardner* v. *Cleveland*, 9 Pick. 336; *Pond* v. *Warner*, 2 Verm. 532; *Morrison* v. *Berkey*, 7 S. & R. 238; *Reynolds* v. *Magness*, 2 Ired. 26; *Brown* v. *Spann*, 3 Hill (S. C.) 324; *Wyman* v. *Gilchrist*, 1 Comst. 562.

Shaw, C. J. The judge, at the trial, seems to us to have taken a wrong view of the nature and legal effect of this contract. The promise of the defendant was to withdraw his suit against the officer — an act which the plaintiff had an interest in having done. He did not withdraw it, and consequently the promise was broken. He is entitled to a verdict for nominal damages for the breach, if nothing more. For every breach of a promise made on good consideration, the law awards some damage.

The court are inclined to the opinion that if the plaintiff had paid the officer his costs, he might recover it in this suit, as incidental damages; and that they may still be recovered, provided they are paid at any time before damages are assessed in this action. The breach of promise to withdraw that action is the gist of this action, and all damages, necessarily resulting therefrom, sustained by the promisee up to the time of the assessment of damages, may be properly embraced in such assessment. It was not a mere contract of indemnity; it was a contract to do something beneficial to the plaintiff, the failure to do which necessarily subjected the plaintiff to loss. For that loss, when actually incurred, the defendant is liable.

Exceptions sustained.

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Peter Goulding *vs.* William O. Swett.

By a mortgage of "the following personal property, to wit: one bay mare; one cow; one chaise and harness; one sleigh, robes and harness; one saddle and bridle; all the farming tools and other personal property in and about the barn and premises at Herbert Hall; all the furniture, and all other articles of personal property in and about Herbert Hall, so called," a family carriage belonging to the mortgagor passes, if on the premises known as Herbert Hall at the time the mortgage is given; and evidence that the mortgagor, immediately afterwards, went upon the premises with the mortgagee, and pointed out this carriage to him as included in the mortgage, is competent evidence to identify it.

Replevin of a family carriage. At the trial in the court of common pleas, before *Mellen*, C. J., the plaintiff claimed title to the carriage under a mortgage thereof from Nathaniel T. Bent, dated May 1st 1856, and recorded on the 5th of November 1856.

The defendant claimed title under a mortgage from Bent, dated August 1st 1856, and recorded on the 9th of September 1856, of "the following personal property, to wit: one bay mare; one chaise and harness; one cow; one sleigh, robes and harness; one saddle and bridle; all the farming tools and personal property in and about the barn and premises at Herbert Hall. All the furniture, including piano, silver ware, table furniture, carpets, pictures, engravings, library, bedsteads and bedding mattresses and all other articles of personal property in and about Herbert Hall, so called."

The plaintiff contended that the carriage, not being specified in the defendant's mortgage, did not pass by the words of general description therein. But the court ruled that the general description was sufficient to pass the carriage, if it was in the barn on the premises of Bent, known as Herbert Hall, at the time the mortgage was given.

To prove that the carriage was upon the premises of Bent at the time the defendant's mortgage was executed, and thus was embraced therein, the defendant was called as a witness, and testified that he and Bent went to the office of an attorney, and together gave directions as to the making of the defendant's

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mortgage; that within two or three days, and, he thought, the next day, Bent called at his shop in Worcester, and executed and delivered said mortgage; and that some time during the same day, and immediately after the execution and delivery of said mortgage, he went with Bent to the premises mentioned in the mortgage. He was then asked by his counsel if Bent then pointed out to him any property; and replied that he did. He was then asked what property he pointed out; and replied, "two horses; a sleigh; the carriage in suit, which was in the barn or carriage house; and a horse and chaise at the door, which he drove me up in." He was then asked, "As what property did he point this out?" and replied, "As the property embraced in the mortgage to me." The plaintiff objected to these questions and answers; but the court admitted them.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

H. Williams, for the plaintiff.

D. Foster, for the defendant.

Bigelow, J. The description in the mortgage to the defendant was sufficient to include the carriage in controversy, it having been proved and identified as having been in the barn at Herbert Hall at the time the conveyance was executed. On this point, we cannot distinguish the present case from *Winslow* v. *Merchants' Ins. Co.* 4 Met. 306, and *Harding* v. *Coburn*, 12 Met. 333. The generality of a description, or the enumeration of specific articles in addition to those comprehended by a general description, does not prevent the transfer of articles not specified by a mortgage, which were intended to be conveyed by it and which are included in the general description, if they can be identified.

The evidence, to the competency of which exception was taken, was clearly admissible for the purpose of identifying the property, and as part of the *res gestæ*. *Exceptions overruled*

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Mary Ann Hoy *vs.* Peter Morris.

A third person who overhears a confidential communication between an attorney and his client may testify of it.

Action of tort for breach of promise of marriage. The answer denied the promise. Trial in the court of common pleas at December term 1858, before *Mellen*, C. J., who signed this bill of exceptions:

"The plaintiff, to prove the promise, offered to show by one Thomas Aldrich, that said Aldrich was at the office of P. P. Todd, then and now one of the defendant's attorneys, about the time of the date of the writ, and soon after the defendant had been married; that the defendant and Robert Furgerson came into the office, and the defendant told said Todd, in the presence and hearing of said Aldrich, that he wanted to see him on private business, and they (said Todd, the defendant and Furgerson) went out of the office, closed the door, and stood outside and near one of the office windows which was closed; that said Aldrich was sitting down by the window and inside of the office to do some writing, and, while there, heard the defendant tell said Todd, his counsel, that he had some real estate in Mendon, which he wanted to convey to said Furgerson, and that he was afraid a girl would sue him for breach of a promise of marriage.

"To the admission of which the defendant's counsel objected, on the ground that the communication thus made to said Todd, his counsel, was a privileged communication, to which said Aldrich, being in the office under such circumstances, could not by law testify. But the presiding judge admitted the testimony. The jury found a verdict for the plaintiff. To which admission the defendant excepts."

P. C. Bacon & P. P. Todd, for the defendant. The communication in this case was made by the defendant to his counsel, as such, for the purpose of professional aid and advice, and was intended to be private and confidential, and he and his counsel

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took all reasonable and proper means to secure its being made under obligations of professional secrecy. *Foster* v. *Hall*, 12 Pick. 93, 99. Communications of this character have always been held by courts to be privileged, and can never be divulged without the consent of the client — it being the privilege of the client and not of the attorney. 2 Stark. Ev. (4th Amer. ed.) 395. 16 Jurist, 30, 41–46. 1 Greenl. Ev. §§ 237, 239–240. 1 Phil. & Amos on Ev. 165–166. *Barnes* v. *Harris*, 7 Cush. 576. *March* v. *Ludlum*, 3 Sandf. Ch. 35. *Gainsford* v. *Grammar*, 2 Campb. 9. *Rex* v. *Withers*, 2 Campb. 579. *Turquand* v. *Knight*, 2 M. & W. 100. *Petrie's case*, cited in 4 T. R. 759. As the attorney and his clerks and agents are forbidden to disclose them, so should they be protected, though a stranger intentionally excluded from the presence of the parties accidentally overhears them. *Jardine* v. *Sheridan*, 2 Car. & K. 24. *DuBarré* v. *Livette*, Peake R. 78. *Bean* v. *Quimby*, 5 N. H. 94.

D. Foster & F. Deane, for the plaintiff.

Merrick, J. Some question was made at the argument, whether the conversation, of which evidence was given at the trial in the testimony of Aldrich, was not one of such character, and having reference to such objects or purposes, that Mr. Todd, the attorney, would not, if he had himself been called as a witness, have been compelled to disclose it. In the case of *Hatton* v. *Robinson*, 14 Pick. 416, which in some respects much resembles the present, it was held, that communications made to an attorney at law, by a party who applied to him to make a conveyance or mortgage of his personal property for the purpose of preventing it from being attached by a portion of his creditors, were competent and admissible evidence. And in the case of *Broad* v. *Pitt*, 3 Car. & P. 519, Best, C. J. said: "A man is not acting as an attorney, when he is consulted about a deed; and I cannot distinguish his situation from that of any other man" But without looking at this distinction, and assuming that the interview between Mr. Todd and the defendant was strictly of a privileged character, and that all the communications of the latter during its continuance were made by him as a client to his counsel and professional adviser, still the testimony of the

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witness Aldrich was admissible, and was properly allowed to be used before the jury.

The privilege of exemption from testifying to facts actually known is extended only to an attorney or legal adviser who derives his knowledge from the communications of a client who applies and makes disclosures to him in his professional character, and to those other persons whose intervention is strictly necessary to enable the parties to communicate with each other. This is the rule which was laid down by the court in the case of *Hatton* v. *Robinson*, before cited; and which seems uniformly to have been recognized as a correct statement of the law upon this subject. *Doe* v. *Jauncey*, 8 Car. & P. 99. *Bramwell* v. *Lucas*, 2 B. & C. 745. *Barnes* v. *Harris*, 7 Cush. 576. Applying this rule to the facts in the present case, the conclusion is inevitable that the statement of Morris to his counsel Mr. Todd was overheard and became known to Aldrich under circumstances which entitled the plaintiff to the benefit of his testimony concerning it. Aldrich was not an attorney, nor in any way connected with Mr. Todd; and certainly in no situation where he was either necessary or useful to the parties to enable them to understand each other. On the contrary, he was a mere bystander, and casually overheard conversation not addressed to him nor intended for his ear, but which the client and attorney meant to have respected as private and confidential. Mr. Todd could not lawfully have revealed it. But, in consequence of a want of proper precaution, the communications between him and his client were overheard by a mere stranger. As the latter stood in no relation of confidence to either of the parties, he was clearly not within the rule of exemption from giving testimony; and he might therefore, when summoned as a witness, be compelled to testify to what he overheard, so far as it was pertinent to the subject matter of inquiry upon the trial this is all that was allowed by the court.

Exceptions overruled.

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Jonathan Day *vs.* John E. Moore.

The originals of a writ of attachment and an execution, with the officer's returns thereon are as good evidence as authenticated copies thereof.

In an action by an officer on an agreement to indemnify him in selling certain property on execution, permitting the plaintiff to ask the defendant, on cross-examination, what property he had when he made the agreement, is no ground of exception.

The admission of evidence in reply, which should have been introduced in chief, is within the discretion of the presiding judge, and not subject to exception.

In an action by an officer on an agreement to indemnify him for making an attachment, the facts, that the defendant directed his attorney to make the attachment, and that upon being asked for a bond of indemnity, he consulted his attorney, and was told by him that if he directed the attachment to be made, or agreed to indemnify the officer, he would be liable, whether he signed the bond or not, are not inadmissible as privileged communications with counsel.

Action of contract by a deputy sheriff upon an agreement of the defendant to indemnify him in selling certain personal property on execution against John C. Murphy.

At the trial in the court of common pleas, at December term 1858, before *Mellen*, C. J., the plaintiff, being shown a paper purporting to be an original writ in an action by this defendant against Murphy, returnable before a justice of the peace, with a return of the attachment of said property, signed by the plaintiff, indorsed thereon, testified that he knew the handwriting of the justice, and that the signature of the paper was his; that the writ was made out in the handwriting of Hartley Williams, Esq., and that the direction to attach property on the back of the writ was in Williams's handwriting. He also testified that he sold said property, by the defendant's direction, by virtue of an execution in his favor against Murphy; and identified as said execution a paper which he produced, with his return thereon, and offered in evidence. The defendant objected to the admission of these papers without further evidence or an authenticated copy of the record; but the court admitted them.

A witness called by the plaintiff testified that, about the time this property was sold on execution, the plaintiff requested the defendant to put his agreement to indemnify him in writing;

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to which the defendant agreed, and the witness prepared an agreement for the defendant to sign; that the defendant said he desired to see his lawyer before he signed it, and went with the witness to Williams's office, and asked Williams, in presence of the witness, if it was right for him to sign the bond which the witness had prepared; that Williams told the defendant that if he directed the attachment to be made, or agreed to indemnify the plaintiff, he would be liable to the plaintiff, whether he signed the bond or not; that the defendant asked if he would be liable for more than the amount of his claim against Murphy, and was told by Williams that he might be. The defendant objected to the admission of this testimony, on the ground that it was a privileged communication. But the court admitted the evidence.

After the plaintiff had put in his case, the defendant was called as a witness, and, on cross-examination, was asked by the plaintiff, what property he had at the time of making the agreement to indemnify the plaintiff, as claimed by him — for the purpose of showing that the defendant was then responsible. The defendant objected to this evidence, on the ground that it did not appear that the plaintiff had any knowledge of the defendant's responsibility at the time of the attachment. But the court admitted it.

The plaintiff, in cross-examination of the defendant, asked him if he instructed Williams to direct the attachment to be made. This evidence was objected to by the defendant as a privileged communication with counsel; but was admitted by the court.

The plaintiff then offered to show that the defendant conveyed away his real estate while the jury were out in an action to recover of this plaintiff for conversion of the same property, which action, as the plaintiff alleged, this defendant had agreed to defend. To this evidence the defendant objected. But the court, "in the exercise of its discretion as to the order of trial, admitted the evidence, subject to the defendant's objection to its competency, as if offered by the plaintiff in putting in his evidence in chief."

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The jury found a verdict for the plaintiff, and the defendant alleged exceptions.

G. Swan, for the defendant.

D. Foster, for the plaintiff.

METCALF, J. 1. The original writ, on which the plaintiff made an attachment, and his return thereon, and the original execution, with his indorsement thereon, were rightly admitted in evidence, although authenticated copies thereof would have been admissible. It was in the plaintiff's option to offer which he pleased. *Sheldon* v. *Frink*, 12 Pick. 568. *Greene* v. *Durfee*, 6 Cush. 362. *Brush* v. *Taggart*, 7 Johns. 19. *Foster* v. *Trull*, 12 Johns. 456.

No reason has been assigned, and we know of none, against the admission of the plaintiff's testimony to the handwriting of the defendant's attorney, on the writ directing an attachment to be made.

2. We see no error in the permission, by the court, of the cross-examination of the defendant as to his property, at the time when he agreed to indemnify the plaintiff. For aught that we perceive, however, his testimony on that matter was wholly immaterial, and might, for that reason, have been excluded.

3. The time, in the course of the trial, when the defendant's deed of his real estate might be received in evidence, was in the discretion of the court. *Chadbourn* v. *Franklin*, 5 Gray, 315. How that evidence was material or relevant to the issue on trial does not appear. But the exception to its admission, like the exception to the cross-examination of the defendant as to his property, cannot be sustained merely on the ground that its admissibility is not shown. *Parmenter* v. *Coburn*, 6 Gray, 509.

4. Nothing was admitted in evidence at the trial, which can, by any legal construction, be deemed a privileged communication made by a client to his counsel. *Exceptions overruled.*

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Daniel Bacon *vs.* Almond Williams & another.

A witness who had been for many years a photographer, and previously "a teacher of the branches usually taught in select schools," including handwriting, was permitted to state his opinion whether certain words on a paper shown him were written before or after the paper was folded. *Held*, that the admission of this evidence was no ground of exception.

A disputed signature cannot be used in cross-examination of a witness to test his accuracy as to another signature.

The rejection of a plan, offered in evidence after all the testimony on both sides is closed, is within the discretion of the presiding judge, and not subject to exception.

Action of contract on a promissory note for $300, made by Almond Williams and Avery Williams to the plaintiff. Answer, payment.

At the trial in the court of common pleas, at December term 1858, before *Mellen*, C. J., the defendants gave in evidence a receipt in these words: "Received of Avery Williams three hundred dollars, for a note against Almond in the hands of Brimblecom. Barre, March 17th 1857. Daniel Bacon."

The plaintiff contended that the receipt was in whole or in part a forgery, and among other witnesses called Albert S. Southworth as an expert, who was examined as to his qualifications and competency as an expert, and on said examination testified "that his occupation was photographing, in which he had been engaged since 1840; that previously to that time he had been a teacher of the branches usually taught in select schools, and, as a teacher, had attended to handwriting; that he had given attention to a comparison of fine and coarse lines, and to an examination of colors; that he had been unable to photograph the receipt exhibited, in the time he had had; but had examined the receipt with a magnifying glass." The presiding judge decided that the witness was not qualified to testify as an expert to his opinion of the genuineness of the receipt by a comparison merely of handwriting; but, against the defendant's objection, allowed him to testify "as to his opinion whether the words 'Daniel Bacon' were written before the

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paper was folded; and that the word 'for' was written after it was folded, because, where the letters forming those words crossed the fold in the paper, the ink had spread into the fibres of the paper broken by the folding of the paper, and, in his opinion, where it crossed the fold the ink had spread in the fold;" and also allowed him to testify "in relation to the various words and letters, the way in which the letters were formed, their appearance and the peculiarities observed by him, as to where the pen was taken off, as to the angles in the letters and a stiffness in a portion of the handwriting;" and to state his opinion as to the ink with which the body of the note was written, as compared with the ink in the signature and date.

James W. Jenkins, a witness professing familiarity with the handwriting of Bacon, and called by the plaintiff, having testified as to the handwriting of the receipt, was asked by the defendants on cross-examination, to test his accuracy and judgment, whether a certain paper, alleged by the defendants, but not admitted by the plaintiff, to have been written by Bacon, was in his opinion the handwriting of Bacon. But the judge excluded the evidence; and ruled, that a paper which had not been proved to be genuine could not be introduced merely as a test of the witness's accuracy.

The defendants offered evidence tending to show that they with others were in the north middle room of Bacon's house on the 17th of March, 1857. To rebut this evidence, the plaintiff introduced several witnesses, who testified that they were at Bacon's house on portions of that day, and did not see either of the defendants there; these witnesses did not state definitely in what room or part of the house they were, and there was no evidence that they were in the north middle room; but their testimony tended to show that some of them were in different rooms, and that one or more of them were in the same room with Bacon nearly the whole of the forenoon and afternoon of that day. At the close of the plaintiff's rebutting evidence, the defendants, in order to explain any apparent contradiction, offered to introduce a plan of the house, showing the different rooms and their location. But the court refused to admit it.

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The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

F. H. Dewey & W. A. Williams, for the defendants. 1. Southworth's testimony should have been rejected. He had not the requisite skill and experience in the examination of feigned and simulated handwriting, and in detecting forgeries, to qualify him as an expert. And his testimony related to matters equally within the knowledge of the jury. *Moody* v. *Rowell*, 17 Pick. 490. *Page* v. *Homans*, 14 Maine, 478. *Commonwealth* v. *Webster*, 5 Cush. 302. *Mulry* v. *Mohawk Valley Ins. Co.* 5 Gray, 541.

2. In the cross-examination of Jenkins, the defendants had a right to test his accuracy by calling his attention to writing not then proved or admitted to be Bacon's handwriting. *Page* v. *Homans*, 14 Maine, 478. *Younge* v. *Honner*, 1 Car. & K. 51.

3. The defendants should have been permitted to introduce the plan, in order to explain to the jury that the defendant could have been in the north middle room, and yet not have been seen by the plaintiff's witnesses.

P. E. Aldrich, for the plaintiff.

Bigelow, J. We can see no valid objection to the competency of the evidence which the court permitted the witness Southworth to give as an expert. The capacity of a witness to enlighten a jury on a matter of science or skill, or on a subject beyond the common experience of men, can be best estimated by the judge who presides at the trial of a cause; and this court would be slow to revise a ruling on such a question, unless the error was very plain and palpable.

2. The rule, as now settled in this commonwealth, concerning the competency of evidence resulting from a comparison of a signature in dispute, with other signatures of the same party, requires that the handwriting used as a standard of comparison should be first established by direct proof of the signature, or other equivalent evidence. *Commonwealth* v. *Eastman*, 1 Cush. 217. *Martin* v. *Maguire*, 7 Gray, 178. This is necessary in order to avoid collateral issues, which would tend to distract the minds of jurors from the precise question before them. The

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same rule is applicable, for the same reason, when a signature not proved is offered for the purpose of testing the accuracy of a witness. Until the jury have first settled whether the signature offered to a witness for his judgment is true or false, they can form no opinion as to his accuracy. If disputed signatures were admissible for the purpose of trying the correctness of the opinions of witnesses, a collateral inquiry would be raised concerning each signature so offered, and a case might be filled with issues aside from the real question before the jury. In the present case, the signature offered to the witness was neither proved nor admitted to be in the handwriting of the plaintiff, nor did the defendant propose to show that it was his genuine signature. The evidence was therefore rightly excluded.

3. The question as to the introduction of the plan, after all the evidence on both sides of the case had been put in, was entirely within the discretion of the judge who tried the case.

Exceptions overruled.

JOHN H. PIERCE & another *vs.* DANIEL F. NEWTON.

Witnesses called to impeach the credit of another witness, and who have testified that his character for truth was bad, may be asked by the party calling them whether this related wholly or in part to that witness's punctuality in paying his debts.

ACTION OF TORT against a deputy sheriff for attaching property of the plaintiffs on a writ against a third party.

At the trial in the court of common pleas at December term 1858, the plaintiffs called several witnesses for the purpose of impeaching the character for truth and veracity of Reuben G. Holmes, a material witness for the defendant. The verdict was for the plaintiffs, and *Mellen*, C. J. signed a bill of exceptions, the material part of which was as follows:

"Some of the witnesses answered on cross-examination in such a manner as to leave the impression that Holmes's bad

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reputation was confined in part, if not entirely, to his promises to pay his debts. On a reëxamination of one of these witnesses, by the plaintiffs' counsel, he proposed questions for the purpose of showing that Holmes's reputation was not confined to such promises to pay. The defendant's counsel objected to this inquiry; and the court sustained the objection, and refused to allow the questions on the reëxamination.

"On the direct examination of the next witness as to character, the plaintiffs' counsel inquired of him, what was the general reputation of said Holmes for truth and veracity; and the witness answered, it was not good. The plaintiffs' counsel then inquired, if such reputation related wholly or in part to said Holmes's want of punctuality in the payment of his debts. To this question the defendant's counsel objected as incompetent; but the court allowed the question to be put to this and several subsequent witnesses, and the same was answered by the witnesses. To this ruling the defendant's counsel excepted."

F. H. Dewey & E. B. Stoddard, for the defendant, cited 1 Greenl. Ev. § 461; *Bates* v. *Barber*, 4 Cush. 108; *Deshon* v. *Merchants' Ins. Co.* 11 Met. 199; *Ingledew* v. *Northern Railroad*, 7 Gray, 91.

L. H. Boutelle, for the plaintiff, was stopped by the court.

By the Court. We can perceive no ground for not admitting the question. It related to the general character of the witness, and was properly admitted for the purpose of showing that the reputation of the witness for want of truth and veracity was general, and not confined to particular instances.

Exceptions overruled.

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CHARLES BOUTON & another *vs.* SAMUEL G. REED.

Evidence of the value, for a special use, of goods sold and retained by the purchaser is inadmissible in an action for the price.

ACTION OF CONTRACT for goods sold and delivered. Trial in the court of common pleas at March term 1859, before *Sanger*, J., who signed this bill of exceptions:

"The goods in question were stock to be used for the manufacture of wheels. Portions of the stock were brought into court by the defendant as samples of the goods received. There was no question but that the goods had been received and kept by the defendant. The defence was, that they were not of the kind ordered or value charged.

"At the trial the following question was put in the direct examination of the defendant, who was on the stand as a witness: 'What was such stock as the samples worth per set, for wheels, at the time of delivery?' This question was objected to by the plaintiffs' counsel, because the rule of damages and the proper subject of inquiry should be the market value or price at the time the articles were delivered. The objection was sustained by the court, and the defendant's counsel was not allowed to put the question in that form. He then varied the question, and put it in the following form, 'What was the market value of that kind of stock for wheels at that time?' And the question was answered by the witness. The jury found for the plaintiff. To this ruling of the court the defendant excepted."

E. B. Stoddard, for the defendant. When goods are furnished for a particular purpose, there is a warranty that they will answer that purpose. Chit. Con. (8th Amer. ed.) 391. *Jones* v. *Bright*, 5 Bing. 533. The plaintiffs, not having fulfilled the order, can only recover what the goods furnished were reasonably worth for the purposes intended by the order. *Hoadly* v. *M'Laine*, 10 Bing. 487. *Acebal* v. *Levy*, 10 Bing. 382. Story on Sales, § 221 note. 3 Phil. Ev. (6th Amer. ed.) 112. The question which was ruled out admitted of an answer as to

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the value of the goods for the manufacture of wheels at the place of delivery; but the ruling of the court confined the defendant to showing a value in a general market.

D. Foster, for the plaintiffs, cited *Loder* v. *Kekulé*, 3 C. B. (N. S.) 128; *Gray* v. *Portland Bank*, 3 Mass. 390; *Coolidge* v. *Choate*, 11 Met. 84.

Shaw, C. J. The judge was quite right in deciding that the question was not admissible in the form in which it was first put. Whether, when goods are ordered for a special use, there is an implied warranty on the part of the seller that they are fit for that use, was wholly immaterial, because no such order was stated or relied on; of course, no such warranty could arise. The action is for goods sold and delivered. It is conceded that the defendant received the goods and retained them. The law implies an obligation to pay their value, *quantum valebant*. If they were ordered for a special purpose, and were not fit for such purpose, the defendant's remedy was to return them or decline receiving them. Such a refusal to accept would enable the party ordering them to recover back the price, if paid; or afford him a good defence to an action for the price. But he may prefer to keep them, and apply them to some other use, or sell them; and if he does, he must pay their actual value, that is, what they were worth at the time and place of delivery, for any purpose. *Exceptions overruled.*

Worcester County Institution for Savings *vs.* Isaac Davis.

The description of a promissory note, in a sealed guaranty, as annexed thereto, and the omission to mention in the guaranty that the note is attested, and bears indorsements of payments of interest, will not exempt the guarantor from the payment of a note corresponding in all other particulars with the description in the guaranty.

A guaranty of a promissory note, expressly "waiving all right to demand and notice," cannot be contradicted by oral evidence of a contemporaneous agreement to collect the note from the principal debtor, and of laches in pursuing him.

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SHAW, C. J. This action is brought upon a guaranty under seal, given by the defendant to the plaintiffs, as follows:

"Know all men, that, for value received, and waiving all right to demand and notice, I hereby guaranty to the Worcester County Institution for Savings, or its assigns, the payment, at the office of said institution, of a certain promissory note, hereto annexed, for three thousand dollars, dated December 23d 1850, signed Alpheus M. Merrifield as principal, and Alpheus Merrifield and Wm. T. Merrifield as sureties, payable on demand, with interest semiannually. In witness whereof I have hereunto set my hand and seal this twentieth day of April A. D. 1854.

"Isaac Davis. (Seal.)"

This specialty, whilst it is remarkable for the brevity of its words, is equally remarkable for fulness and clearness in the terms of the contract created by it. The plaintiffs are an institution created for the express purpose of receiving deposits of money, and keeping them invested in safe and interest-paying securities. The longer therefore a safe debt is continued unpaid, so much the better apparently for them. The note is described with precise accuracy in all its principal particulars, and for greater certainty is specified as annexed at the time of execution. It was not a note made in the ordinary course of mercantile business; the idea of its being a dishonored note, because overdue, can have no place. The note was made by a principal and two sureties, three or four years previously; one of the sureties had then been dead more than a year, and his estate was in process of settlement. By the terms of the contract, the guarantor exempted the institution from making any demand of any of the parties, and from giving him notice of any delinquency in the payment of interest or principal. By another of its terms he warranted all payments of interest and principal to be made at the office of the institution.

The defendant having admitted by the answer that he executed the instrument, and the plaintiffs having produced the note unpaid, it remained for the defendant to show some grounds of defence; and this leads us to a consideration of the exceptions.

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The defendant offered to show that no note was annexed to the instrument when he signed it.

Strictly speaking, the defendant was estopped from denying that any note was annexed when he signed the guaranty, because he had admitted it by that act. If he intended to say that a different note was produced and exhibited at the negotiation, from that now appearing as annexed — in fact charging a fraudulent change in the note, and in effect a forgery — undoubtedly it would have been a good and meritorious defence; but such an imputation of fraud was expressly disclaimed at the argument.

If the true ground of objection is, as it seems to us, that the instrument of guaranty does not sufficiently refer to and describe the note produced, to identify it, then the true ground of defence would be, that the descriptive part is too uncertain to be intelligible, and therefore it is void for uncertainty. Let us examine it in this view. Did that description include this note? The note now produced as annexed, compared with that described in the instrument, corresponds in amount, date, parties, principal and sureties, times of payment of principal and interest, and is payable to the plaintiffs or order. But it is said that the note produced is an attested note, and bears indorsements of payments of interest, and these are not mentioned in the description in the guaranty. True, these particulars are not mentioned; but they are not repugnant, they are perfectly consistent with what is expressed, and therefore have no tendency to disprove the identity. Besides, they are unimportant particulars, not essential to a complete note. Then it is a clear rule of law, even in the construction of a deed of real estate, that if the descriptive part is correct in so many particulars as clearly to define and identify a parcel, although it is obviously incorrect and fails to correspond in one or more particulars, yet the estate passes. Such a mistake, known in conveyancing as *falsa demonstratio*, does not make the deed void.

Such a rule is essential to carry into effect the intent of parties, and afford security to the most important rights. To apply this rule to the present case: there being no intimation that any other note was in existence, corresponding in any one particular

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with that described in the defendant's deed — for this instrument under seal was his deed — supposing him not concluded by estoppel from denying that this note was then annexed, and the question an open one upon the proof, can there be the least room to doubt that this note, then and now held by the institution, was the same note which the defendant intended and undertook to guaranty?

Another exception is, that the defendant offered to show by parol evidence that this guaranty was signed under an agreement that the plaintiffs should collect this note from the estate of Alpheus Merrifield, and that they were chargeable with laches in not having so collected it; and that the plaintiffs knew, when they first notified the defendant, that all claim was lost on the estate of Alpheus Merrifield deceased, and on the other signers.

As to the offer of parol evidence, it was an offer to prove facts directly repugnant to the express terms of the contract; to introduce a condition by parol, essentially changing the contract and therefore was directly contrary to the rules of evidence, and rightly rejected. There was therefore no laches on the part of the plaintiffs; on the contrary, the defendant had exempted them from the duty of making any demand and giving any notice. It was competent for the defendant, at any time, to pay the note at the office of the plaintiffs, and make it his own, so as to avail himself of the means of obtaining payment of the parties liable.

The other exceptions are all substantially considered in the suggestions already made. As they stand in the bill of exceptions, they are thus stated: That the estate of Alpheus Merrifield, before it was distributed, was solvent, and the note might have been collected from it; that the other promisors were men of property, and that the note, if reasonable efforts had been made, could have been collected of them; and that the defendant did not know of any default in the payment of interest or principal until notified in July 1857.

The answer is, that the defendant, by his guaranty to the plaintiffs that the whole should be paid to them at their own

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office, had exempted them from any active measure; that the legal effect of his contract was, that the proper parties should pay the interest and principal, at the times required by the terms of the note, without any demand on the part of the plaintiffs, and in default of their making such payments, he would make them himself.

The court are of opinion that all the evidence, offered by the defendant and rejected, was incompetent and rightly rejected.

Exceptions overruled

P. C. Bacon & E. B. Stoddard, for the defendant.

G. F. Hoar & J. H. Hill, for the plaintiffs.

EZRA PUTNAM *vs.* SAMUEL M. DIKE.

The statute of limitations is no bar to an action on a debt contracted forty years ago in another state, without proof that the defendant has ever been in this commonwealth.

SHAW, C. J. This is certainly an extraordinary case. A small debt, contracted in Vermont in 1815, has increased by simple interest to three times the original amount, by lapse of time, being a period of over forty years.

The only defence relied on is, that it is barred by the statute of limitations. This, of course, must mean the statute of limitations of Massachusetts. The statute of limitations affects the remedy only, and is therefore local in its operation; neither the statute of limitations of Vermont, where the contract was made, nor that of any other state or county, has any efficacy in Massachusetts. See *Bulger* v. *Roche*, 11 Pick. 36, corrected and explained by a note to *Brigham* v. *Bigelow*, 12 Met. 270.

The parties both lived in Vermont, where the cause of action accrued; and there is no evidence to show that the defendant ever came within the limits of this state. If the defendant never came into Massachusetts after the cause of action accrued, the statute never began to run, and no length of time could make

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that statute a bar to an action which the plaintiff might bring in this state. The direction of the judge therefore was right.

If indeed the defendant had never been an inhabitant of this state, and there was no effectual attachment of the defendant's property in this suit, and the defendant had appeared specially, and pleaded in abatement to the jurisdiction of the court, we do not perceive why it would not have been a good defence to this suit. But no such course was taken, and perhaps the facts would not warrant it. *Exceptions overruled.*

H. Chapin, for the defendant.

P. C. Bacon & P. E. Aldrich, for the plaintiff.

IVERS R. HARVEY *vs.* ALEXANDER DEWITT.

A count praying for relief in equity, under *St.* 1853, *c.* 371, cannot be joined with a count at law, without the affidavit required by *St.* 1840, *c.* 87, § 1, to give jurisdiction to this court.

ACTION OF CONTRACT, commenced in April 1858. The declaration contained three counts, the first of which alleged that the defendant owed the plaintiff $571.48 for money paid by the plaintiff for the defendant and at his request, and interest thereon; and the second, that the defendant owed the plaintiff $571.48, being seven eighths of the amount paid by the plaintiff at the defendant's request for rebuilding and repairing a dam in Pepperell, in which the plaintiff and defendant were jointly interested, according to an account annexed to the writ, and interest on seven eighths of that amount.

The third count alleged that the plaintiff and the defendant were jointly interested, the defendant as owner of seven eighths and the plaintiff of one eighth, in a water power privilege appertaining to mills owned by them in severalty, and in the dam furnishing a head of water for those mills; that the dam being out of repair and needing to be rebuilt, the plaintiff requested the defendant to join in with him in making the necessary

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repairs and in rebuilding the dam, and the defendant declined so to do, but requested the plaintiff, if the dam could be repaired for anything like $500 or $600, to go on and make the repairs; and the plaintiff did so, and expended in so doing the sum of $653.12; and that the defendant owed the plaintiff $571.48, being seven eighths thereof, but pretended that he was not bound to pay so much as that, and that the plaintiff's claim, or some part thereof, was not well founded; and the plaintiff prayed for relief in equity, and for an account, and for further relief.

The defendant demurred to this declaration, as insufficient in law, 1st. For misjoinder of a count at law with a count praying for relief in equity; 2d. For want of showing notice to the defendant of the amount paid for repairs, and a demand upon him for his proportion thereof; 3d. Because the third count of the declaration did not state any matter of complaint against the defendant, for which the plaintiff had not a plain, adequate and complete remedy at the common law of this commonwealth, if he had any remedy of any kind; 4th. That the declaration was in other respects uncertain, informal and insufficient.

D. Foster, for the defendant.

P. C. Bacon, for the plaintiff.

Shaw, C. J. With all the brevity and latitude allowed by the practice act of 1852, *c.* 312, and the *St.* of 1853, *c.* 371, in the forms of declaration, this action cannot, we think, be maintained. It attempts to combine, in one suit, matters purely of law, and matters in equity. It cannot be maintained as a suit in equity; because it is apparent that, as to the claim in the first count at least, the plaintiff, if he has any remedy, has a plain, adequate and complete remedy at law. Nor can it be maintained as a suit at law; because it was brought originally in this court, without an affidavit stating that the amount sought to be recovered exceeded three hundred dollars. *St.* 1840, *c.* 87, § 1 *New Braintree* v. *Southworth*, 4 Gray, 307.

Demurrer sustained; judgment for the defendant, with costs, but without prejudice.

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HARRIET F. SAYLES *vs.* DANIEL FANNING.

The "accusation and examination" of a complainant in a bastardy process, under the Rev. Sts. c. 49, § 1, may be reduced to writing by another person in the magistrate's absence before the examination.

A difference between the examination of a complainant under the bastardy act, by the magistrate, and her subsequent complaint to the court, in stating the time when the child was begotten, is not a fatal defect in the process.

BASTARDY PROCESS. The complainant, who was an infant, prosecuted the suit by her father as her next friend.

At the trial in the court of common pleas at December term 1858, before *Mellen*, C. J., the justice of the peace before whom the proceedings were instituted identified a paper, entitled "the voluntary accusation and examination of Harriet F. Sayles," as the complaint sworn to by her before him; and testified that he examined the complainant. On cross-examination he testified "that the paper produced was not in his handwriting; that it was not written in his presence, and he was not sure whether it was signed in his presence or not; but that the complainant and her father either signed it in his presence or acknowledged their signatures to him, and she made oath to it before him; and that he examined the plaintiff carefully verbally, but not in writing, except as above stated." The respondent objected to the admission of this paper as the "accusation and examination" which the Rev. Sts. c. 49, § 1, provide that "the said justice shall take, in writing, under oath." But the court admitted it.

The complaint alleged that the child was begotten on the 16th of November 1857, and the declaration filed in the court of common pleas, that it was begotten on the 15th of October 1857. The respondent contended that the papers were informal and defective in this respect, and objected to the introduction of any testimony. But the court overruled the objection.

The respondent being found guilty, alleged exceptions.

G. F. Verry, for the respondent, cited Rev. Sts. c. 49, § 1; *Drowne* v. *Stimpson*, 2 Mass. 441; *Stiles* v. *Eastman*, 21 Pick. 132; *Wiley* v *Yale*, 1 Met. 553.

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P. P. Todd, for the complainant.

SHAW, C. J. The examination was sufficient; the magistrate having examined the complainant on oath carefully and fully to all the material averments. The paper is entitled "the accusation and examination." No law requires that the result of the examination shall be committed to writing by the magistrate or by any one in his presence.

As to the discrepancy between the complainant's statement of time in her examination, and in her subsequent complaint to the court of common pleas, it is a difference of statement, which affected only her credit. *Exceptions overruled.*

GEORGE W. WHEELER *vs.* HENRY GOULDING.

In an action commenced by a city treasurer against one who has fraudulently transferred shares in a corporation in order to avoid taxation, to recover the penalty imposed by *St.* 1843, *c.* 98, § 3, "one half for the use of the city, and the other half for the use of the person furnishing the necessary evidence in the case," a nonsuit may be entered by agreement of the plaintiff and the defendant, against the objection of the person who furnished the evidence.

ACTION by the treasurer of the city of Worcester, on the *St.* of 1843, *c.* 98, § 3, to recover of Goulding (who was alleged to have fraudulently transferred certain shares in the Providence and Worcester Railroad Corporation for the purpose of avoiding taxation) half of the par value of said shares, one moiety to the use of the city, and the other moiety "for the use of the person or persons furnishing the necessary evidence in the case."

After the defendant had answered, denying the allegations of the declaration, Welcome Farnum presented a petition to the court, in which he represented "that previously to the commencement of the action he furnished to the assessors of the city of Worcester, by whose direction said action was brought, and to said George W. Wheeler, treasurer, the necessary evidence that said conveyance was so made by said Goulding as

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aforesaid; that the petitioner is informed and believes that the said city of Worcester and said Goulding have settled or are about to settle the said action, without any regard to the rights of the petitioner, and so that the whole proceeds of said action shall be or have been recovered by the city of Worcester;" and moved that he might be admitted as a party to prosecute said action in the name of the city of Worcester or the treasurer thereof; and offered to file a bond of indemnity to the city against costs.

The plaintiff and defendant objected to the filing or allowance of the petition, and afterwards agreed that a nonsuit might be entered in the action; and at August term 1859 of the superior court, *Wilkinson*, J. declined to hear evidence of the truth of the facts stated in the petition, and ordered it to be dismissed, on the ground that, as a matter of law, the petitioner was not entitled to appear, even if the facts were true. The petitioner alleged exceptions.

C. Devens, Jr. for the petitioner. An action on the *St.* of 1843, *c.* 98, can only be brought by the treasurer, and he can empower no one else to bring it. *Colburn* v. *Swett*, 1 Met. 232. The treasurer is not a common informer, but is entitled to bring this action as trustee for the parties interested in the penalty, and has assumed to act as such, and has sued for the petitioner's share of the penalty. It is therefore a stronger case than that of a mere common informer, and even in those cases the party other than the informer, interested in the penalty, although it be the king, cannot settle the suit without payment of the share of the informer. *Stretton* v. *Tayler*, Cro. Eliz. 138. *Farrington's case*, Cro. Car. 10. And the informer cannot settle the suit without leave of court, which will never be granted without payment of the shares due other parties. *Sts.* 18 Eliz. *c.* 5, § 3; 27 Eliz. *c.* 10. *Howell* v. *Morris*, 1 Wils. 79. *Brown* v. *Bailey*, 1 Bur. 1929. *King* v. *Clifton*, 5 T. R. 258. *Howard* v. *Sowerby*, 1 Taunt. 103. *Lee* v. *Cass*, 2 Taunt. 213. *Crowder* v. *Wagstaff*, 1 Bos. & Pul. 18. *Bradway* v. *Le Worthy*, 9 Johns. 251. *Minton* v. *Woodworth*, 11 Johns. 474. *Raynham* v. *Rounseville*, 9 Pick. 44. *Burley* v. *Burley*, 6 N. H. 200.

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No permission of court is asked for or granted in the present case; and perhaps, if it were a case of a common informer, the court would not interfere, because such a settlement would not be a bar. *Raynham* v. *Rounseville*, 9 Pick. 44. *Haskins* v. *Newcomb*, 2 Johns. 405. But in this case it would, the treasurer being the only one entitled to sue. The petitioner can have no remedy against the plaintiff for a share of the amount received by him for settlement of the action, even if it be equal to the whole penalty. *Raynham* v. *Rounseville*, 9 Pick. 44. He has a right to proceed in the name of the treasurer, upon securing him from costs, having a direct interest in the forfeiture to which he is entitled, for aiding in bringing an offender before the court. *Burley* v. *Barley*, 6 N. H. 200.

This is like a case of an equitable assignment of a chose in action, in which the assignor cannot discharge the suit of the assignee or prevent him from using his name; or the case of one having a lien on a judgment, who may sue it in the name of the general owner, although he release. *Dunn* v. *Snell*, 15 Mass. 481. *Jones* v. *Witter*, 13 Mass. 304. *Usher* v. *D' Wolfe*, 13 Mass. 290. *Brigham* v. *Clark*, 20 Pick. 43. *Woods* v. *Verry*, 4 Gray, 357. When the condition of a bond is for the benefit of a third person, such person may maintain an action in the name of the obligee. *Sanders* v. *Filley*, 12 Pick. 554. Whether the nominal party could have been compelled to commence the action or not, he has now no right to discontinue. The evidence presented before the commencement of the action entitles the petitioner to the moiety of the penalty, as much as if furnished at the trial. If an actual judgment in the action is necessary, the petitioner has a right to prosecute the action to judgment.

Unless this construction is given to the statute, there is no means of preventing collusion between the nominal plaintiff and the defendant, by which that plaintiff will obtain more than he is entitled to, and others no part of the forfeiture. Or the treasurer, after securing the share of the town may be exposed to the temptation of making corrupt bargains for his own benefit.

F. H. Dewey, for the defendant, (*D. Foster*, for the plaintiff, with him.)

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Shaw, C. J. This action is quite distinguishable from a *qui tam*. That is a well established remedy, known to and regulated by the common law, as a mode of securing the execution of penal laws, where it is expressly given by statute, and has its own rules. But it can be used only in cases where it is expressly given. *Colburn* v. *Swett*, 1 Met. 232.

Even in a strictly technical *qui tam* action, we suppose the suit, that particular suit, is under the direction and control of the plaintiff who brings it, and he may abandon or discontinue it; but it is with this qualification, that if discontinued or nonsuited without the authority and permission of the court, the case will stand as if no action had been brought, and will not bar another suit for the same penalty, brought by any other party entitled to sue for such penalty.

But the statute, giving the penalty sued for in this case, is precise and explicit, in directing that the amount forfeited is "to be recovered by the treasurer of the city or town in which such shareholder may reside; one half to the use of the town, and the other half for the use of the person furnishing the necessary evidence in the case." It is perfectly clear therefore, and this rule is not denied by the petitioner, that no other person but the treasurer of the city of Worcester could sue for this penalty. As this power is vested in a high officer of the municipality, for whose special benefit the law was made, and as he is to recover no part of the penalty to his own use, it may be a question whether, in prosecuting for such penalty, he would be bound by the lawful orders and directions of the municipal government, whose officer he is; but that is not a question arising here. We are all of opinion that, except so far as he may be bound to act under such orders and directions of the city government, or is disposed to exercise his discretionary power, in subordination to such directions, not only the right to institute such suit is vested in such treasurer, but the right to prosecute and discontinue it.

The petitioner having, as he says, an interest in the penalty, for which alone the treasurer of Worcester can sue, contends that his case is analogous to that of the assignee of a chose in

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action, who, without other authority, may sue in the name of the legal creditor, and whose right will be recognized by the court before which the action is brought, and be protected against the interference of the assignor. But the analogy does not hold; such an assignment is a power to collect and sue for the debt, and, when recovered, to hold it to his own use, and such a power, being coupled with an interest, is irrevocable.

Besides, if the analogy would hold, the petitioner, if no action were voluntarily brought by the treasurer, might bring an action in the name of the treasurer, on the ground of having furnished the necessary evidence. If he might, any other person might, with an averment that he had furnished such necessary evidence. And we do not perceive why the right and power of the treasurer to prosecute his own suit, in such time and manner as his own judgment may dictate, would be suspended or taken away. Such, in our judgment, is not an admissible construction of the statute. Nor are we aware of any mode by which the treasurer would have been judicially required, against his own determination, to commence a suit for such penalty, for the benefit or at the instance of this petitioner. The right of the petitioner does not arise until some penalty has been recovered. It appears to us clear, that if the petitioner could not legally have required the city treasurer to commence a suit for his benefit, he cannot now ask the aid of the court, to permit him to take the prosecution of the suit out of the hands of the officer in whom the law has placed it, and conduct it himself, though he might, in fact, have a right to claim part of the penalty, when recovered. On these considerations, we concur with the superior court, that this petition cannot be granted.

Exceptions overruled, and petition dismissed.

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Samuel Jennison, Treasurer of the State Lunatic Hospital at Worcester, *vs.* Inhabitants of West Springfield.

In an action by the treasurer of the State Lunatic Hospital against a town, to recover the expenses of the support of a lunatic pauper, a general verdict and judgment for the defendant in a similar action between the same parties, to which the defendant answered, among other defences, that the pauper had no settlement within the Commonwealth, is conclusive evidence that the pauper had no such settlement during the period of furnishing the supplies sued for in the former action, if that question was submitted to the jury in that case.

Action of contract by the treasurer of the State Lunatic Hospital at Worcester, to recover the expenses of the support of a pauper from the 1st of June 1854 to the 1st of March 1857. Trial in the superior court before *Wilkinson*, J., to whose rulings the defendants alleged exceptions.

H. Morris, (*H. Chapin* with him,) for the defendants.

P. E. Aldrich, (*P. C. Bacon* with him,) for the plaintiff.

Bigelow, J. In this action the plaintiff seeks to recover of the defendants the expenses of the support of a lunatic pauper, on the ground that his residence, at the time of his commitment to the hospital, was in West Springfield. By *St.* 1837, *c.* 228, § 7, it is provided that no town shall be liable for such support, if it shall be made to appear that the lunatic, for whom payment is demanded, had no settlement within this commonwealth. The defendants relied on this provision in making their defence to the present action. For the purpose of showing that the pauper had no settlement in the State, they offered in evidence the record of a former judgment between the same parties in an action brought for the support of the same pauper. By that record it appears that the defendants, in their answer in the former action, alleged, among other grounds of defence, that the pauper had no settlement in any town in this commonwealth. It was also proved that evidence was offered by both parties, at the former trial, bearing on the issue raised by this averment of the defendants, and that the question whether the pauper had any settlement within this state was, among others,

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submitted to the jury. The record also shows that a verdict was rendered in favor of the defendants in that action, upon which judgment was duly entered. Here then it appears that this fact was directly put in issue by the pleadings, and may have been the sole ground upon which the former verdict was rendered. Upon well established principles, that verdict and judgment are conclusive between the parties to the record, as to the fact thus put in issue and determined. It cannot again be litigated between them. We cannot distinguish this case from the recent decisions in *Merriam* v. *Whittemore*, 5 Gray, 316, and *Sawyer* v. *Woodbury*, 7 Gray, 498. It is wholly immaterial to the question of the conclusiveness of a judgment, whether the issue between the parties was raised by the averments of the plaintiff or of the defendant. The real point is, Was the fact in issue the subject of judicial controversy, relied upon either in the support or the defence of the action, and comprehended within the verdict at the former trial? If so, it is by inference of law, conclusively settled between the parties by the judgment. But if the fact was only incidental to the issue raised by the parties, or is to be deduced from the verdict and judgment by inference only, then it is not finally adjudicated so as to be binding on the parties.

In the present action, it was conclusively proved at the trial by the former judgment, that the pauper, up to the 1st of June 1854, being the end of the period for which the plaintiff sought in the former action to recover for his support, had no settlement within this commonwealth. It follows that the legal effect of this evidence was misconceived at the trial, and its rejection was erroneous. *Exceptions sustained.*

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ELIJAH M. DICKENSON & others *vs.* INHABITANTS OF FITCHBURG.

A petition for the assessment of damages occasioned by the taking of land to widen a highway, and a petition for a jury to revise the damages to the same land, assessed by selectmen, for altering the grade of the way, may be submitted together to one jury.

On the hearing before a sheriff's jury, of a petition for damages for land taken for a highway, evidence that a witness, not shown to be an expert, "offered the petitioners one dollar a foot for a portion of the land in question," is incompetent.

A party to a suit, admitted as a witness in his own favor, may testify to his opinion, if an expert.

A witness who has testified to his opinion of the value of land taken for a highway, may be asked, on his examination in chief, the facts and reasons on which his opinion is founded.

Evidence that land taken for a highway has since been laid out as a sidewalk is inadmissible in reduction of the owner's damages. But evidence that when it was taken it was probable that it would be improved in that way is admissible.

A special county commissioner, who as such has assessed damages in other cases for land taken for highways, is competent to give his opinion of the effect of taking for a highway part of certain land which he has often seen.

In estimating the value of land taken for a highway, its value to build permanent brick and stone buildings upon in the future is to be considered.

The value of land taken for a highway is to be assessed according to its value at the time of the taking, having regard however to the uses to which it may probably be applied.

In estimating the damages occasioned by taking land for a highway, no benefit is to be set off which is received by the petitioner in common with other abutters on the same street, no part of whose land is taken.

It seems, that the surrender of a lease to the lessor, after the land has been taken for a highway, with a release of the lessee's claim to damages, is admissible in evidence on the assessment of the damages.

APPEAL by both parties from the acceptance by the superior court of the verdict of a sheriff's jury empanelled to assess the damages occasioned to the petitioners by taking their land for the purpose of widening and altering a portion of the highway called Main Street, leading through the village of Fitchburg. The certificate of the sheriff stated the following rulings:

1. "At the time this petition was filed, the petitioners presented another petition, in which they set forth that the respondents altered the grade of a highway adjoining their land; that they were aggrieved at the determination of the selectmen on the question of damages thereby; and prayed for a jury to ascertain the same. The county commissioners ordered that both cases should be heard by the same jury, and the jury were summoned to try both cases. After the jury were assembled, and

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before they were empanelled, the respondents objected to proceeding further, because it was improper for the same jury to hear and determine both cases. But the jury were empanelled in compliance with the order of the commissioners, and both cases tried before the same jury, against the objection of the respondents.

2. "A witness, called by the petitioners, was permitted, against the objections of the respondents, to testify that he had offered the petitioners one dollar a foot for a portion of the land in question. After the testimony had been so given, and after the sheriff had been requested to note the respondents' exceptions thereto, the counsel for the petitioners stated that, to save a contest about it, he would withdraw the testimony. The sheriff did not, however, instruct the jury to exclude this testimony; nor was he requested to do so by the petitioners.

3. "One of the petitioners was permitted, against the objection of the respondents, to testify that he had been offered one dollar a foot for all said estate; and also to give his opinion of the value of the estate.

4. "A witness, called by the respondents, testified that in his opinion the market value of the estate was enhanced by the alleged taking of a part of it for a highway. He was then asked by the respondents to state the grounds and reasons upon which his opinion was founded. The sheriff ruled, that the grounds and reasons upon which such opinion was founded were inadmissible as testimony, and did not permit the question to be answered.

"Another witness, offered by the respondents, gave in testimony a like opinion; and was asked to state the facts on which his opinion was founded. But the sheriff ruled, that the facts upon which such opinion was founded were not material to the issue; and did not allow them to be given as evidence.

5. "After the adjudication by the county commissioners, and previously to the hearing before the jury, the town had laid out all the land, taken from the petitioners, for a sidewalk, and paved it with brick for the accommodation of foot travel. The respondents offered evidence tending to show the effect upon the

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petitioners' adjoining estate, in case the land taken was wrought and prepared for the accommodation and convenience of foot travel. But the sheriff ruled, that it was not competent to show what effect would be produced on the market value of the estate by putting the land taken to any specific purpose for which a highway may be used, or by preparing or appropriating it to accommodate any particular class of travel; and declined to permit the testimony to be given.

6. "The respondents called Thomas Billings, one of the special commissioners of the county of Worcester, who testified that he lived in Lunenburg, and had seen the land in controversy a number of times, and that as such commissioner he had been called upon to assess damages for land taken for highways. He was then asked this question: 'From your knowledge of the land of the petitioners, what would be the effect of the taking of the land for the widening of the street, to be used for the purposes of a highway?' And his answer was 'It would be beneficial.' The petitioners objected to the witness being called, as against public policy; he being one of the board (though not having acted in this case) from whose decision the appeal was taken; also that he had not been shown to be competent to give an opinion as asked; and also that the question was incompetent. The objection of the petitioners was overruled, and the testimony admitted.

7. "At the request of the counsel for the petitioners, the sheriff gave the following instructions to the jury: That the jury are to estimate as a subject for damages the value of the land taken; the loss of its use to the rest of the estate, whether to build upon or to use in connection with the buildings, or to enable the owners to make use of their land in the future, or to enhance the value of the land in the sale; and that the value of the land taken, to build permanent brick and stone buildings in the future, is an element of damage to be considered.

8. "That the jury are confined, in their estimate, to the state of things existing at the time of the alteration; that the jury are not to take into consideration anything done, or that might thereafter be done, by any other person or corporation; and

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that at the time of the alteration of the way the right of the petitioners vested in their damages as the facts then stood.

9. "That the damages for the taking of the land can only be offset by the benefits, (if any,) from the widening of the road as a highway; that the jury are to take into consideration no benefits to the petitioners, that are not *peculiar* to them, and not shared by them in common with the rest of the public who are abutters upon the same street, and whose land has not been taken for the alteration.

10. "That the fact that at the time of the location there was a lease of a portion of the premises, which was afterwards surrendered, and all claim to damages released to the petitioners, as appears on the back of the lease, and by the paper filed during the trial, cannot in any way affect the claim for damages."

"The respondents also desired instructions to be given to the jury as follows, which I declined to present, to wit:

"First. That the direct effect upon the market value of the adjoining estate of the petitioners, occasioned by the taking of a portion of it for the purposes of a highway, and the probable uses and purposes to which the land taken may be lawfully put by the town, either for a sidewalk or the convenience of carriages, and whether such uses be injurious or beneficial to the estate, are proper matters for the jury to consider in deciding the question of damages; and

"Second. That the benefits to the estate of the petitioners, occasioned by the taking of a part of it for a public highway, should not be excluded by the jury in their consideration of the question of damages, simply because such benefits are shared by some other abutters on the same highway."

C. H. B. Snow, for the petitioners. 1. There is nothing in the statute, which restricts the commissioners from sending all the petitioners' claims for damages to the same jury, although one claim is in the nature of an appeal from the decision of the commissioners, and the other from that of the selectmen. The statute simply provides in each case that the petitioner may have a jury to determine the matter of his complaint, and the

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order of the commissioners in the present instance complies with the statute in letter and spirit. Rev. Sts. *c.* 24, § 13; *c.* 25, § 6. *Wyman* v. *Lexington & West Cambridge Railroad*, 13 Met. 311.

2. Offers made in good faith for the land in question are competent evidence to show the value of the land. *Wyman* v. *Lexington & West Cambridge Railroad*, 13 Met. 316.

3. It was competent for the petitioner to show what he had been offered for the estate in question, including the land taken, (and this is all that is intended by the ruling,) and he must be presumed to be sufficiently acquainted with the value of his own land to give a competent opinion thereon.

4. To allow the party calling an expert, to put into the case as evidence the reasons or facts upon which the opinion of the expert is founded, would open the door to the introduction of evidence otherwise entirely incompetent, and which might be in the highest degree injurious to the other party. Such reasons and facts are admissible upon cross-examination only. 1 Greenl. Ev. § 446. *Ingledew* v. *Northern Railroad*, 7 Gray, 86.

5. The right of the petitioners to damages attached at the time of the appropriation of the land by the action of the commissioners; and the fact that the land, at a subsequent period, had been put specifically to one of the uses to which a highway may be dedicated, is not admissible in reduction of damages. Rev. Sts. *c.* 24, § 11. *Dwight* v. *County Commissioners*, 11 Cush. 203. *Meacham* v. *Fitchburg Railroad*, 4 Cush. 291. *Parks* v. *Boston*, 15 Pick. 198.

6. The testimony of the commissioner should have been excluded, upon grounds of public policy, and because it did not appear that he had any acquaintance whatever with the value of the land in question, or of land in its vicinity, or the purposes to which it might be put. *Regina* v. *Gazard*, 8 Car. & P. 595. *Johnson* v. *Durant*, 4 Car. & P. 327. 1 Greenl. Ev. § 249.

7. The value of the land taken, for any use to which it might probably be applied, was admissible.

8. The value of the land, at the time when it is taken, is the value to be assessed.

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9. The rule stated by the sheriff as to the offset of benefits against damages was such as would fairly be deduced from the established authorities. The instructions prayed for by the respondents were properly refused; for the first embraced all benefits shared by the petitioners in common with others, as well as those peculiar to them; and so much of it as related to what might be the future action of the town in relation to that part of the highway which included the land in question, was too remote and speculative to be considered by the jury in reduction of damages. The second was vague, incorrect and calculated to mislead the jury, and was incorrect in terms; for if the same benefit is shared by several, it can no longer be said to be peculiar; and the expression "some other abutters" is broad enough to include the larger proportion, or even all the abutters on the highway, and therefore the instruction prayed for was in direct contravention of the established rule. *Meacham* v. *Fitchburg Railroad*, 4 Cush. 291. *Upton* v. *South Reading Branch Railroad*, 8 Cush. 600. *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 10 Cush. 385. *Brown* v. *Providence, Warren & Bristol Railroad*, 5 Gray, 35.

10. The fact of the existence of the lease, taken in connection with the subsequent action in regard to it, constituted no objection to the present proceeding, nor to the assessment of the entire damage to the petitioners. *Meacham* v. *Fitchburg Railroad*, 4 Cush. 291. *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 10 Cush. 385. *Davidson* v. *Boston & Maine Railroad*, 3 Cush. 91. *St.* 1851, *c.* 290.

G. F. Bailey, for the respondents. 1. This case ought not to have been sent to the same jury with the one to revise the proceedings of the selectmen on the question of damages occasioned by altering the grade of a highway. The two cases originated at different times, and in separate and distinct acts; they arose under different statutes, and were adjudicated upon originally by tribunals of entirely different nature. They are not on the same general subject. Rev. Sts. *c.* 24, §§ 9, 15; *c.* 25, § 6. *Lanesborough* v. *County Commissioners*, 22 Pick. 282.

2. A mere offer for the land in question is not admissible as

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evidence of its value. The offer may have been rejected for other reasons than the value of the land. If testified to by the petitioner, it is objectionable as hearsay. It only tends to show the opinion of the one who made the offer, as to the value of the land; and it does not appear that he was competent to give such an opinion. *Davis* v. *Charles River Branch Railroad*, 11 Cush. 506. *Tufts* v. *Charlestown*, 4 Gray, 539.

3. The petitioner's opinion of the value of his own land ought not to have been admitted. *Wyman* v. *Lexington & West Cambridge Railroad*, 13 Met. 316.

4. It is competent for an expert to state, upon his examination in chief, the facts and reasons on which an opinion that he has given is founded. *Dickinson* v. *Barber*, 9 Mass. 225. *Commonwealth* v. *Webster*, 5 Cush. 301. *Dwight* v. *County Commissioners*, 11 Cush. 201. *Keith* v. *Lothrop*, 10 Cush. 453. *Morse* v. *Crawford*, 17 Verm. 499. *Morse* v. *State*, 6 Conn. 9. *Mahoney* v. *Ashton*, 4 Har. & McHen. 63.

5. The damages and benefits to the petitioner's remaining estate depend, in a great degree, on the manner in which the land taken is to be used, and on the nature and amount of travel over it; it is therefore competent to show these things; and if it appears that a particular class of travel will seek this point, then it is competent to show the effect of such travel on the market value of the estate. *Dwight* v. *County Commissioners*, 11 Cush. 201. *Meacham* v. *Fitchburg Railroad*, 4 Cush. 291.

6. The testimony of the special commissioner was properly admitted.

7. The sheriff erred in instructing the jury to consider "the value of the land taken, to build permanent brick and stone buildings in the future, an element of damage," irrespectively of the probabilities that the land taken would ever be thus used. *Dwight* v. *County Commissioners*, 11 Cush. 201. *Brown* v. *Providence, Warren & Bristol Railroad*, 5 Gray, 35.

8. The instructions given were vague and indefinite, and calculated to mislead, as tending to confine the jury to a naked change in the line of the highway, without permitting them to

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consider the probability that the land taken would be suitably wrought to accommodate public travel, or a class of public travel, or the fact that it had been so wrought.

9. The instruction given as to the set-off of benefits, together with the sheriff's refusal to allow the second prayer of the respondents, left the jury to infer that direct benefits to the adjacent land of the petitioners could not be allowed in set-off, if such benefits were shared by one or two other abutters on the same street; and that benefits, to be allowed in set-off, must be peculiar to the petitioners. This is wrong; it is more strict than any previous cases. *Meacham* v. *Fitchburg Railroad*, 4 Cush. 291. *Dwight* v. *County Commissioners*, 11 Cush. 201. The sheriff erred in rejecting the instructions prayed for by the respondents.

10. When the county commissioners adjudicated on the question of damages, the petitioners had only a reversionary interest in a portion of the land, there being at that time an outstanding lease for the term of twenty years. The petitioners should not be allowed to increase their damages before the jury by extinguishing this lease. It affects the respondents unjustly in the matter of costs. *Parks* v. *Boston*, 15 Pick. 198. *Davis* v. *Charles River Branch Railroad*, 11 Cush. 506. Rev. Sts. *c.* 24, §§ 32, 38.

Shaw, C. J. This case arose thus: A narrow strip of the petitioner's land having been taken by competent authority, to widen a highway called Main Street in the village of Fitchburg, they applied to the county commissioners to issue a warrant for a sheriff's jury to assess their damages.

1. It is admitted that the proceedings in the case were regular, unless it was irregular for the commissioners to send this and another petition of the same applicants, for damage to their estate, to the same jury. No special reason is assigned in the present case why the two petitions, between the same parties, for two species of damage to their estate, should not go to the same jury, and therefore the case seems to be within the spirit, if not the letter, of the Rev. Sts. *c.* 24, §§ 15, 76. It does not appear to be objectionable. The warrant having been returned

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by the sheriff to the superior court, with the verdict of the jury thereon assessing damages for the petitioners, its acceptance was objected to by the respondents on the grounds set forth in the certificate of the sheriff, as a bill of exceptions. But the verdict was accepted by the judgment of the superior court, from which this appeal was taken.

The following were among the points principally relied on by the respondents against the acceptance of the verdict.

2. A witness was called by the petitioners, and, against the objection of the respondents, was permitted to testify that he had offered the petitioners one dollar a foot for the land. It is stated that afterwards, to avoid a contest, the counsel for the petitioners said he would withdraw this testimony; but he did not ask the sheriff to instruct the jury to exclude this testimony, nor did he so instruct them.

This, we think, was inadmissible. Suppose the offer was one dollar a foot for the whole lot, which does not distinctly appear; it has no tendency to show that each foot was worth a dollar. Suppose the whole lot to be one thousand square feet, and the land taken one hundred, leaving nine hundred feet, the whole lot may still be worth one thousand dollars.

If it be said that the front part must be the most valuable; it may be so, whilst it was front, and all the rest rear. But when the front was taken for a street, the rear became front, with all the rights of ingress and egress.

Again, the witness may have had special reasons for making the offer. Had he been called to give an opinion, and, amongst other things, had stated that he had made an offer, and the circumstances under which it was made, we are not prepared to state that it would have been incompetent. But this does not appear.

3. One of the petitioners, being called as a witness, under the recent law making witnesses parties, was permitted, against the objection of the respondents, to testify that he had been offered one dollar a foot for all said estate. As to the offer, unexplained, the former remarks apply. As to the part of the objection, that the petitioner was allowed to give his opinion of

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the value of his own land; since the statute has provided that any party may be a general witness in his own case, we cannot see on what ground this testimony can be limited to particular facts, to the exclusion of others. The admission of parties, not only interested to the full amount of the matter in controversy, but animated by all the feelings and passions which stimulate parties to litigation, must to some extent change the character of a jury trial. It obviously throws a higher responsibility on juries, carefully to weigh the credit due to such witnesses, by all the legal means in their power. In a matter of plain fact, where the witness must know how the truth is, and therefore must testify truly or commit perjury, the jury would probably be more likely to give him credit; but when it is matter of opinion, and when opinion is so easily warped by prejudice and interest, especially on a point where it is ordinarily practicable to procure other like evidence from unobjectionable sources, we should suppose that very little weight would be given to the testimony of a party. But this is for the jury, and not the judge, to decide.

4. The respondents having offered the testimony of a witness, that in his opinion the market value of the estate was enhanced by the widening of the street, the witness was asked by the respondents to state the grounds and reasons upon which his opinions were founded; this was objected to by the petitioners, and rejected by the sheriff.

The court are of opinion that this evidence ought to have been admitted. The ground on which an expert, a person of large experience in any particular department of art, business or science is permitted to testify to his opinion, is, that from his larger experience and more exact observation of facts, and the connection between certain appearances, and their causes or results, he is able to draw correct conclusions from circumstances, which a man of ordinary knowledge and experience could not do. The circumstances on which such an opinion may be founded, are either facts of general notoriety, assumed to be known to all persons of skill and experience in the department to which they pertain, and which, when explained, may be

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comprehended and applied by any person of good understanding; or it may be founded on facts proved.

Such general facts, assumed to be generally known without specific proof, because they are capable of being known and understood, without any such proof, to all inquirers, are vastly too numerous to define; but the point may be illustrated by saying, they are such as the elements and forces of physical nature, the structure, capacities and functions of the human and other animal bodies, the common powers, propensities and passions of human nature, and the impelling and governing motives to human action. As these are capable of being comprehended, when explained, without specific proof, it appears to the court that the witness should be permitted to explain the grounds and reasons of his opinion to the court and jury; they may readily perceive the force of his reasoning, the soundness or fallacy of his logic, and therefore judge of his capacity to give an opinion on the subject, and the correctness of his conclusions, and consequently the weight due to his opinion.

But it is objected that the admission of this evidence would open the door to evidence entirely incompetent, by allowing the witness to state the facts on which the opinion is founded, facts not proved by competent evidence.

This objection seems to us to be founded on a misconception of the manner in which the investigation is to be conducted, and the testimony of experts received and applied. It assumes that the facts will be taken to be true, because the witness has stated that he founds his opinion upon them. But this is quite a mistake. In order to obtain the opinion of a witness on matters not depending upon general knowledge, but on facts not testified of by himself, one of two modes is pursued: either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him; and in either case the question is put to him hypothetically, whether, if certain facts testified of are true, he can form an opinion, and what that opinion is? The jury will then be instructed, if the truth of any such fact is contested, first to consider whether the fact on which such opinion rests is proved to their satisfaction; if it

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is, then to give such weight to the opinion resting on it as it deserves; but if the fact is not proved by the evidence, then to give the opinion no weight. This is necessary to enable the jury, upon the true theory of jury trial, to decide all questions of fact, upon competent evidence laid before them. *M'Naghten's case*, 10 Cl. & Fin. 200.

But the consideration submitted in the argument in opposition to this view, namely, that the opinion may be given on the assumption of facts not proved, is a strong additional reason why the grounds and reasons of the opinion should be stated, in order that the jury may see that it is not founded on hearsay, general rumor, or facts of which some evidence may have been given, but, being controlled by other evidence, are not found true by the jury. This inquiry has been more frequently made in cross-examination, yet we are of opinion that it is competent evidence in chief. It is in fact this general knowledge, on the specific facts judicially proved, from which the jury draw their ultimate conclusion, though in matters of science they may be aided by the more exact observation and the larger experience of the trained expert. *Keith* v. *Lothrop*, 10 Cush. 453.

5. We think the evidence of the fact that, when the damage was assessed, a sidewalk had been laid down on and over the land, and of the value of such sidewalk to the estate, was rightly rejected by the sheriff, because that use might be changed afterwards to any other use to which a street may be appropriated. But the uses to which such a strip, taken to widen a street in a village or city, would probably be applied for a sidewalk or other use beneficial to the adjacent owners, might properly be taken into consideration, in estimating the benefit to be set-off against the damage done to the same estate by the taking.

6. We think Mr. Billings, a special county commissioner, was rightly admitted as a witness, to testify to his opinion of the value of the estate, and the effect of the taking upon such value. His position and duties would ordinarily qualify him to form a correct opinion on such subjects; and it contravened no public policy.

7. We now come to the consideration of the instructions

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given by the sheriff to the jury. By the first, the direction was, that the jury might take into consideration the possibility of appropriating the land to the use of building brick or stone houses thereon; this was not exceptionable, as we understand it It was one of the uses to which it was possible the estate might be applied, and there was no necessity of qualifying it by proof that such use was probable. The actual value of the estate, before and after the widening of the street by taking a portion of it, were proper subjects for the jury to take into consideration, and the exceptions thereto, we think, were not well taken.

8. The instructions that damages are to be assessed according to the effect of the taking of the land at the time it was taken, were right. But this is not to be understood that the damage was to be estimated as the land then lay, unfitted for use as a street; but according to the prospective use of the street when wrought and fitted for use as a part of the street, for a sidewalk or carriage way; and the consequence of such taking of part, to the residue of the land when thus fitted for use as part of the street.

9. We think the instructions as to the set-off of benefits were correct, unless it may be that the sheriff placed some peculiar stress on the word *peculiar*, as underscored. We presume it was a mere caution not to lay stress on that vague, general, indefinite benefit, which all inhabitants of a particular locality are said to derive from a great public improvement as a canal or railroad. The true rule is stated in *Upton* v. *South Reading Branch Railroad*, 8 Cush. 600, and *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 10 Cush. 385.

10. We are inclined to think that the evidence of the surrender of a lease, before the damages were assessed, ought to have been received, because it left the estate discharged of any other interest, as if no other had existed. But as the lease had a short time to run, and probably at a rackrent, there was so little interest in the leaseholder, to be affected by the taking of this small strip of land, that whether it subsisted or not could only affect the damage. It could hardly of itself be considered a sufficient ground, if it stood alone, for disturbing the verdict.

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For these reasons, this court are of opinion that the directions to the jury were incorrect in several material particulars; that the verdict returned ought not to be accepted; and that a mandate go to the county commissioners, directing them to issue a new warrant to assess the damages of the petitioners.

JOSHUA E. BEMIS *vs.* DOLLY ANN BEMIS, Administratrix.

An action on a decree of the probate court for the payment of a balance due from the estate of a deceased guardian to his ward is barred by *St.* 1852, *c.* 290, in two years from the appointment of the guardian's administrator, although the decree was not obtained until the two years had expired.

ACTION OF CONTRACT, commenced on the 29th of March 1859, by a minor son of Martin Bemis, suing by E. J. Whittemore, his guardian, against the administratrix of the estate of Lewis Bemis deceased. The parties submitted the case to the decision of the court upon the following facts:

Lewis Bemis was appointed the plaintiff's guardian in March 1848, and continued in that trust until his death in November 1856. The defendant was appointed his administratrix on the 20th of December 1856, and gave bonds for the discharge of that trust, and within three months thereafter gave due notice of her appointment, as by statute provided. Whittemore was appointed the guardian of the plaintiff on the 16th of February 1859. The defendant, as administratrix, upon a citation issued to her upon the application of the plaintiff by his present guardian, filed in the probate office in March 1859 an account of the guardianship of Lewis Bemis, and on the 19th of March said account was allowed by the probate court, and the sum of $1,486.93, having been found due to the plaintiff as the balance of that account, was ordered to be paid over to the plaintiff. Due demand was made upon the defendant therefor, and this action was brought to recover it When this action was

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brought, there was no personal property remaining in the hands of the defendant; but there was real estate of which Lewis Bemis died seised, sufficient to pay this claim. The estate was never represented insolvent.

P. C. Bacon & P. E. Aldrich, for the plaintiff. Lewis Bemis, as guardian, held the plaintiff's estate in trust, under the supervision of the court of probate, and until that trust was terminated, and his accounts were closed and settled in the probate court, either by himself or his administratrix, no cause of action accrued to the plaintiff, to recover the amount due him under that decree. The administratrix is the proper person to settle the account. Rev. Sts. *c.* 79, §§ 1–6. *Curtis* v. *Bailey*, 1 Pick. 198. An action of debt will lie on this decree against the defendant. *Storer* v. *Storer*, 6 Mass. 390.

The statutes of limitation, Rev. Sts. *c.* 66, § 4, and *St.* 1852, *c.* 294, do not apply to proceedings in the probate court, under whose charge and jurisdiction the plaintiff's estate was, while the guardianship accounts remained unsettled; but only to actions against administrators as such. *Green* v. *Dyer*, 32 Maine, 460. If the plaintiff had commenced proceedings in the probate court immediately after the appointment of the defendant as administratrix, for the purpose of enforcing the settlement of the guardianship account, he might not have been able to procure a final decree on which he could sue in this court until after the two years had elapsed. The remedy against the heirs or sureties is merely cumulative.

C. Devens, Jr. & W. T. Harlow, for the defendant.

Shaw, C. J. This is a suit at law, founded on contract, in which the plaintiff, by his guardian, seeks to recover a judgment *de bonis intestati*, and can have no other. Such a suit is expressly barred by *St.* 1852, *c.* 294, limiting the action to two years from the time of giving bond. In this case the administratrix was appointed and gave bond in December 1856, the two years expired in December 1858, and this suit was commenced in March 1859. The guardian by whom the plaintiff now sues was appointed on the 16th of February 1858, almost a year before the expiration of the two years' limitation.

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If the cause of action did not accrue till the settlement of the guardianship account in the probate office, and that was not until after the lapse of two years, then no cause of action ever accrued against the administratrix, and the plaintiff's remedy, if he has any, is against the heirs. If it was a debt, due upon the decease of the guardian, like that of other creditors, requiring only a settlement of the account at the probate office, to liquidate it and ascertain the amount, then it was barred by the two years' limitation. In either case, this action against the administratrix cannot be maintained, and the remedy of the ward, if he has any, is against the heirs of the intestate, or by suit on the guardianship bond.

Judgment for the defendant.

HENRY CHAPIN, Judge of Probate and Insolvency, *vs.* GEORGE H. LIVERMORE & another.

The sureties on a guardian's bond are not discharged from liability by the fact that the guardian's account is not settled until more than two years after his death, and after the right of action against his administrator is barred by the statute of limitations.

ACTION OF CONTRACT against the sureties on a bond given by Lewis Bemis as guardian of Joshua E. Bemis and Pamela K. Bemis. The case was submitted to the court upon an agreed statement of facts, and argued by *P. C. Bacon*, for the plaintiff, and *C. Devens, Jr. & W. T. Harlow*, for the defendants. After a consultation of all the judges at Boston in June 1860, the opinion of the court was drawn up by

HOAR, J. The defendants are the sureties upon a guardian's bond. The guardian died in November 1856, and his administratrix gave bonds and published the notice of her appointment in December 1856. A citation issued to her to settle the guardianship account, and she filed the account on the 19th of March 1859, and it was allowed on the same day; and, the ba-

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ance, which was found due from the guardian upon the account, not being paid, this suit was brought on the 29th of March 1859. New guardians were appointed in December 1857 and February 1858.

By the 26th section of the 79th chapter of the Revised Statutes, suits against the sureties upon a bond given by a guardian, are limited to "four years from the time when the guardian shall be discharged." This action was not barred, therefore, under that statute.

But the defendants contend that they are exonerated, because the remedy against the administratrix is barred by *St.* 1852, *c.* 294, upon the ground that when a principal debtor is discharged by the laches of the creditor, the sureties will also be discharged.

The relation of a guardian to the property of his ward is peculiar. The guardian is entitled to the custody and management of the ward's estate; but the property in it does not vest in him. It remains the estate of the ward, notwithstanding the guardian's appointment, and no action can be maintained by the guardian in his own name respecting it. It is the duty of the guardian to keep his ward's estate distinct from his own and his possession of the ward's estate does not, in strictness, create a debt from him to his ward. *Conant* v. *Kendall*, 21 Pick. 38. By the death of the guardian, the guardianship is terminated, and being a personal trust, does not pass to the executor or administrator; and the property remains the property of the ward. It does not become assets in the hands of the administrator, to be administered; but, if capable of being distinguished as the ward's estate, is held by the administrator merely for its preservation, to protect the rights of the guardian, and temporarily those of the ward, until an account can be settled in the probate court, those rights definitely determined, and the property delivered to a new guardian, or to the ward, according to the decree of that court.

The administrator is the usual and proper person to present the account of the deceased guardian for settlement; but it has been held that it may be presented and its allowance procured

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by the sureties upon the guardian's bond. *Curtis* v. *Bailey*, 1 Pick. 199.

In view of these considerations, it is difficult to see how there has been any such laches in the case before us, as should operate to discharge the sureties. If no debt existed from the guardian to the ward, there was no cause of action existing, in favor of the ward, before the death of the guardian. If any estate of the ward came into the possession of the administratrix, it would not be assets of her intestate to be administered, and her duty to deliver it to the new guardians upon demand, after the settlement of the guardianship account, would not be terminated upon the expiration of the time limited for suits against her in her capacity as administratrix. Her possession of that estate would be rather in the nature of a bailment than of a debt; and a cause of action would first arise when, by the settlement of the account, it was determined how much she had a right to retain, and how much should be paid or delivered to the new guardians. The cause of action against her, as the representative of her intestate, first accrued when, upon the settlement of the account, and a demand made in conformity with it, it first appeared that there was a balance of the estate of the ward, which the intestate, in violation of his trust, had not left in readiness to be delivered or paid over according to the decree of the court of probate.

It might not be practicable to settle the account of guardianship within the two years to which the liability of the administratrix was limited. If it was for the interest of the sureties to have a speedy settlement, they could have taken measures to secure it. There was nothing in the relations of the parties, from which the ward or his representatives were bound to suppose that the whole estate would not be found ready to respond to the decree of the court of probate when the account should be settled, or that the sureties on the bond would be prejudiced by the delay.

It is then a cause of action first accruing against the estate of the intestate, after the time limited for suits against the administratrix has elapsed, and an action against her is barred by

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the limitation of two years. That it did not sooner accrue can not be regarded as laches by the creditor, but is rather to be regarded as a not improbable incident to the nature of the contract which the sureties assumed. *Defendants defaulted.*

PRESIDENT, DIRECTORS AND COMPANY OF THE GRAFTON BANK *vs.* WILLIAM M. BICKFORD & others.

The provision of the *St.* of 1856, *c.* 284, § 5, that if any judge of insolvency "shall, from sickness, absence or other cause, be unable to perform the duties required of him in any case arising within his jurisdiction," such duties shall be performed by the judge of the adjoining county, therein specified, does not extend to the case of a vacancy in the office of judge of insolvency in the county where the case is pending.

Proceedings in insolvency, commenced before a judge who has no jurisdiction, will be set aside on a bill in equity, filed under the *St.* of 1838, *c.* 163, § 18, more than a year after

MOTION to dissolve a temporary injunction heretofore granted on a bill in equity filed in June 1859, by creditors of Henry D. Stone, an insolvent debtor, to stay the proceedings in his case, upon the ground that Judge Hodges, the judge of insolvency before whom the proceedings were commenced, had no jurisdiction. The questions arising upon this motion were submitted to the court upon a statement of facts, so much of which as concerns the points decided was as follows:

"On the 21st of January 1858, the Honorable Alexander H. Bullock, judge of insolvency for the county of Worcester, resigned his office, and no other person was appointed and qualified to hold said office until after the proceedings of the Honorable Horace L. Hodges, which are set forth in the bill. Franklin County was the county adjoining Worcester, having the least number of inhabitants, according to the next preceding decennial census; and Hampshire County was the county adjoining Franklin, having such least number, according to said census, and also the county adjoining Worcester, having such least number, except said Franklin.

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"Before the 1st of January 1858 the Honorable Horace G. Newcomb, judge of insolvency for the county of Franklin, died, and no person was appointed and qualified to succeed him in said office till after said proceedings of said Hodges.

"On the 1st of November 1857 an order 'that this court be held at Worcester on the first Tuesday of each month,' had been passed by Judge Bullock, and recorded by the register of insolvency for the county of Worcester in the first page of the book in which are kept by said register the dockets and short memoranda of the proceedings of all the cases in insolvency which have been commenced in said county since the passage of the *St.* of 1858, *c.* 32, and of all such cases which have arisen in said county since the date of said order, including the case of said Stone. On the 23d of January 1858 the register entered in the first page of said book the following certificate, and transmitted a copy thereof as therein stated; and also recorded a copy of said certificate, and of the certificate of transmissio thereof, in the record of the first case in which said judge sat.

"'1858 January 23d. Judge Bullock having resigned, a copy of the following certificate was transmitted to Hon. Horace I. Hodges, judge of insolvency in and for the county of Hampshire:

"'Worcester ss. January 22d 1858. I hereby certify that by the resignation of Honorable A. H. Bullock, late judge of insolvency in and for the county of Worcester, which resignation took effect on the 21st day of January inst., the office of judge of insolvency for said county is now vacant.

'John J. Piper, Register.'

"On the 2d of February, being the first Tuesday in said month, a large number of meetings in insolvency being appointed to be held, and there being no judge present, the said meetings were adjourned by said register to the 9th of February, and on that day this entry was made on said page:

"'1858 February 9. The court was held, pursuant to adjournment, by Hon. Horace I. Hodges, judge of insolvency for the county of Hampshire, as acting judge for the county of Worcester.'

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"During all the period from the resignation of said Bullock until a time after all said proceedings of said Hodges took place, Hodges acted in a great number of cases as judge of the insolvency court of the county of Worcester, and also as judge of the insolvency court of the county of Franklin, being all the cases that had arisen in those counties during said vacancies; and no other person had so acted.

"Said Hodges was personally present in the county of Worcester when the petition, hearing and other proceedings in the case of said Stone took place. The record of the proceedings in the case of said Stone is not yet fully made up, and the case is not yet closed. John J. Piper, who was register of insolvency for the county of Worcester during all said proceedings, now holds the office of register of probate and insolvency for said county."

Those parts of the argument only are reported, which affect the point decided by the court.

C. Devens, Jr. & G. F. Hoar, for the defendants. It may admit of grave doubts whether the plaintiffs are entitled to any remedy in equity; whether their remedy at law is not plain, adequate and complete; and whether a bill in equity will lie to try questions of jurisdiction of a court of record which is not alleged to be infringing on the jurisdiction of any other court; or to determine the right to his office of a judge acting in such court of record. But the defendants have no desire to raise any questions that do not directly affect the validity of their election as assignees and their right to act in such capacity.

The provisions of *St.* 1856, *c.* 284, § 5, authorize the judge of the insolvency court of the adjoining county, therein specified, to act in case of a vacancy in the office of judge of insolvency for any county, caused by death or resignation. This section is to receive a liberal construction, in accordance with the general policy of the system of which it forms a part. *Dearborn* v *Ames*, 8 Gray, 1. *Osgood* v. *Fernald*, 10 Gray, .

This is not a question of defining the limits of the operation of the insolvent laws; but whether a particular clause will apply to a case admitted to be within the insolvent laws. The general

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policy of the insolvent laws and the particular purpose of the *St.* of 1856, *c.* 284, alike require the construction contended for by the defendants.

The general policy of the insolvent law is equality among all creditors, instead of preference to the most diligent, which was the rule of the common law. To secure such equality, the statute makes many provisions, of which the section in question is one, for securing promptness and rapidity of action to prevent preferences or concealment of property by the debtor. It contemplates the necessity of interposing between the rendition of judgment and the issuing of execution; of interfering when property is removed from the State, and when it is fraudulently concealed, and in sundry other familiar cases, requiring the most instant remedy. For this end it recognizes the necessity that a magistrate should always be accessible who can issue process, and grant relief on a hearing of the most summary nature — thus differing from all the cases of probate courts. This is frequently as necessary to relieve the debtor from imprisonment, as to protect creditors from fraud. It cannot be supposed that the legislature meant to provide for the case of a temporary illness or absence of a judge, and to leave unprovided for the most important case, commonly of longer duration, of vacancy in the office.

The special purpose of the *St.* of 1856, was to substitute a court of record, having general jurisdiction of the subject matter, for a special magistrate, who is a ministerial officer, whose jurisdiction is personal, and confined to the case. The court still exists, though there be a vacancy in the office of judge. And there is no transfer of the case to an adjoining county, which might be inconvenient to parties interested; but the judge comes in from the adjoining county.

The words "sickness, absence or other cause," used in § 5, concerning the judge, have the same extent as "death or absence" of the register in § 14; the general word "absence" being mentioned in each, but different particulars enumerated. The legislature intended to provide for all cases where there was no judge in the county, legally capable of performing the duties. This construction is in accordance with opinion of the commis-

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sioners on the revision of the statutes in 1859. *c.* 118, § 4, note A similar construction has been adopted by this court in like cases. *Opinion of Justices*, 14 Mass. 470. *Williams* v. *Robinson*, 6 Cush. 333.

Since the establishment of the insolvent system, there have been only two or three years during which there were not more than one officer vested with jurisdiction in each county. *Sts.* 1838, *c.* 163, §§ 1, 17; 1848, *c.* 304, §§ 1, 3; 1850, *c.* 207; 1851, *c.* 322; 1852, *c.* 112.

The legislature have recognized the right of Hodges to sit in these cases, by an express legislative declaration of the construction of this statute. Resolve of 1858, *c.* 35. And this is entitled to weight in the construction of so recent a statute. *Bacon, appellant*, 7 Gray, 391, 392.

Hodges was judge of insolvency *de facto* for the counties of Franklin and Worcester, and his title to his office or the validity of his proceedings therein cannot be inquired into except by *quo warranto*. It appears from the record that, acting under a claim of right, he was holding the stated terms of the court in which these proceedings were had and under the seal of which this warrant issued. *Commonwealth* v. *Fowler*, 10 Mass. 301. *Fowler* v. *Bebee*, 9 Mass. 231. *Bucknam* v. *Ruggles*, 15 Mass. 180 *Doty* v. *Gorham*, 5 Pick. 487.

The plaintiffs have been guilty of such laches as to forfeit any title to equitable relief. The proceedings had gone on for more than a year previous to the date of their bill, all the facts relied upon by them were either within their knowledge or patent on the public records, and they should not be allowed, after property has been collected and transferred and valuable rights are depending upon them, to question them. An application in equity, in the nature of an appeal, should not be so long delayed, when an appeal at law under the same statute must be made in ten days. *St.* 1838, *c.* 163, §§ 4, 18.

The plaintiffs were creditors, entitled to have all the proceedings revised on appeal or petition, and cannot question their regularity collaterally. *Whithead* v. *Mallory*, 4 Gray, 180. *Partridge* v. *Hannum*, 2 Met. 569. *Wheelock* v. *Hastings*, 4 Met

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504. *Grant* v. *Lyman*, 4 Met. 470. *Penniman* v. *Freeman*, 3 Gray, 248. *Delafield* v. *Freeman*, 6 Bing. 224.

If the question is doubtful, the disastrous consequences which would follow from setting aside these proceedings are to be regarded. Opinion of Thomas, J., 8 Gray, 23.

B. F. Thomas, (*W. F. Slocum* with him,) for the plaintiffs The jurisdiction of this court to determine this question upon this process is clear under *St.* 1838, *c.* 163, § 18. *Partridge* v v. *Hannum*, 2 Met. 569. *Hanson* v. *Paige*, 3 Gray, 239.

By *St.* 1856, *c.* 284, § 1, a court of insolvency is established for each county, and a judge appointed for each county, whose jurisdiction is to be the same as that of commissioners of insolvency under former statutes. *Sts.* 1856, *c.* 284, § 2; 1848, *c.* 304, § 3; 1838, *c.* 163, §§ 1, 17. That jurisdiction is limited to the county, except so far as it is extended by § 5 of *St.* 1856 *c.* 284. This section provides for the inability of a judge in a county to perform the duties in any given case, from sickness, absence or other cause, or when he is interested in the case. The case of a vacancy in the office by death or resignation is not provided for, as it would have been had such been the intention of the legislature, as in *Sts.* 1838, *c.* 163, § 17; 1850, *c.* 207, § 1; 1856, *c.* 284, § 1.

In the legislation of the Commonwealth, in the creation of courts having, like the insolvent court, jurisdiction throughout a county, it has not been usual to provide for a transfer of the duties to any judge or court in another county. Where a vacancy has arisen by death or resignation, the practice has been to wait till the office is filled, as in the case of the probate court. *Sts.* 1783, *c.* 46, § 3; 1810, *c.* 36; 1817, *c.* 190, § 5. Rev. Sts. *c.* 83, § 15.

When a court of insolvency, a court of record, having a single permanent judge, with jurisdiction throughout the county, was established, the same policy was adhered to. One obvious reason for this is, that the business and jurisdiction of the several courts may be kept distinct and separate. Another is, that the business of one county court should not, by the failure of executive appointment, be transferred to the judge of another county and court. The effect of such a construction would be, that the

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executive need appoint but one or two judges of insolvency throughout the State.

The words of the *St.* of 1856, *c.* 284, § 5, are, "If any of said judges shall," from one of the causes stated, "be unable to perform the duties required of him in any case." Such language could not aptly nor appropriately be used in relation to a judge who was dead, or had ceased to be judge by resignation. Inability to perform duties cannot be predicated of one who no longer exists, nor of an office which is vacant. Inability in the incumbent "to perform the duties required *of him*" is what the statute provides for, and only "during such inability."

The original petition in insolvency in this case purports to be addressed to the judge of insolvency for the county of Worcester. There was then no judge of insolvency in that county. No question of the inability of the judge, therefore, could arise.

The decision was made at Boston on the 4th of February 1860.

Shaw, C. J. This is a controversy between different classes of creditors, claiming rights adversely to each other; and the parties have agreed upon a statement of facts, as far as they affect the question of jurisdiction.

The question in the present case depends upon the true construction of the *St.* of 1856, *c.* 284.

This act made considerable alterations in the system of insolvent laws, commencing with *St.* 1838, *c.* 163, and altered and modified by many intermediate acts. One great purpose of the act seems to have been to establish a court of a fixed and permanent character, where all insolvent proceedings should be afterwards commenced and conducted. It constituted a court of record, to be held by a judge commissioned and qualified for the office according to the constitution, to be paid by a fixed salary, such court to be established in a fixed place for keeping its records in the shire town of the county; also to have a recording office and a register to record its proceedings. And all the jurisdiction in cases of insolvency, before that time, vested in judges of probate, masters in chancery, or commissioners of insolvency, was thenceforward to be vested in such court of insolvency. *Dearborn* v. *Ames*, 8 Gray, 1.

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There is a provision that the judge, as well in vacation as at a stated court, may do certain things which may be considered as matters of course, which require no order of notice or hearing of parties; implying that the other and ordinary business of the court is to be done in court, and in presence of the register. These considerations are perhaps not otherwise of importance than as they tend to show the fixed and permanent character of the court, and the mode of conducting its judicial proceedings, compared with the former administration of the insolvent laws.

The fifth section of *St.* 1856, *c.* 284, is as follows: "If any of said judges shall, from sickness, absence or other cause, be unable to perform the duties required of him in any case arising within his jurisdiction, or shall be interested in any such case, the duties required of him shall, if such case shall arise in the county of Dukes County or Nantucket, be performed by the judge of the insolvency court of Barnstable County; and if such case shall arise in any other county than Dukes County or Nantucket, such duties shall be performed by the judge of the insolvency court of that adjoining county having the least number of inhabitants according to the next preceding decennial census. And the register of the court within whose jurisdiction such case shall arise shall make upon the record of the case a certificate of such inability, upon its being made known to him, and shall forthwith transmit a certified copy of the same to the judge whose duty it is to act in the case, and who shall, during such inability, act in the case in the county in which the case shall arise."

Upon a careful examination of this section of the statute, looking at the general scope and purpose of the provision, and at each particular clause and word, we are of opinion that it was not intended to provide for calling in a judge from a neighboring county to hold a court when the office of the regular judge of such court is vacant; but that it was intended to provide for invoking such aid, when the office is full, but when the incumbent is unable, from sickness, absence or other cause of similar kind, to perform the duties which might be justly required of him, if such disability did not exist.

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The importance of this question seems to make it necessary to analyze this section and examine it in detail. The exigency specified by the statute is the inability of the judge, by reason of sickness or absence, not merely when the judge is absent, or when the judge is not present.

Again; no duties can be required to be performed by a deceased person, or by one who has been, but has ceased to be, a judge. These words rightly describe duties to be performed by an absent judge, that is, an existing judge not present. The words are "required of him." If it had been merely "duties of the office," it would have been easy to use other words, or words equivalent, instead of the words "required of him," which imply an existing person. And further, "in any case arising within his jurisdiction" — the jurisdiction of such judge. Can a judge be said to have any jurisdiction, when he is out of office by death or resignation?

A similar argument may be drawn from the clause requiring a certificate to be made by the register of the court. He shall make upon the record of the case a certificate of such "inability" of the judge upon its being made known to him; not of his death or resignation. In the present case, the register did not enter on his book a certificate of the inability of the judge to attend by reason of absence, but the fact of the resignation of Judge Bullock, and the consequent vacancy in the office. We do not mean to say that this certificate was wrong; on the contrary, it is the only certificate he could make with truth, and it was strictly correct.

The theory of construction which would render a vacancy in the office of judge an exigency for calling in a judge of insolvency from another county, would seem to require a certificate to be entered by the register, to some such effect as this:

"I hereby certify, that by the resignation of Hon. Alexander H. Bullock, late judge, &c. the office of judge of insolvency for the county of Worcester is now vacant, and I further certify the inability of the said judge, by reason of absence occasioned by such resignation, to perform the duties required of him."

Such a certificate seems to be almost contradictory; and yet

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it only states in words the necessary facts, if the theory of interpretation relied on in support of the jurisdiction of Judge Hodges is correct. That theory implies that the absence, that is, the mere non-presence of any judge qualified to act as judge of insolvency in any county, although there be no such judge, because the office is vacant, and that fact known to the register and certified on his record, is an "inability" which, under this statute, warrants the calling in of a neighboring judge.

Then taking the whole section and reading it through, we can come to no other result than the one stated, as to the intent and purpose of the legislature.

It is argued, however, that all the reasons of urgency which apply to the case of the disability of an incumbent in the office, apply to the case of a vacancy. In answer to this argument we say that when the terms of a statute are clear and free from ambiguity, and the matter is plainly within the scope of just legislative authority, there is not much room for questioning the reasons on which the legislature have acted. But there are some considerations which may have influenced the legislature in making a distinction between inability of an incumbent and a vacancy. The inability may continue for months, or even years, when business would suffer extremely if there is no relief; and yet no successor can be appointed when there is no vacancy. But under the appointing power of the executive, the vacancy may be filled in a fortnight, and ordinarily would be filled in the course of a few weeks.

It is the manifest policy of the law, that the important judicial duties of a judge of a court of insolvency for a county, should be performed by a permanent local judge, rather than by the temporary service of a judge from another county.

If it be said that this judgment comes too late, and after the irregularity in the commencement of the proceedings has been too long acquiesced in to be now disturbed, we answer that we have not the precise date before us at which this bill was filed, and we think it was not at a great distance of time; but however this may be, the substantial answer, as it appears to us, is, that lapse of time could only be evidence of acquiescence and

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consequent consent; and in a case like the present, affecting a great variety of persons and interests, consent cannot give jurisdiction.

It is argued, among other things, for the defendants, that the validity of these proceedings in insolvency cannot be drawn in question, in a collateral proceeding. Supposing this argument to be correct, we think its operation is to support this bill which seeks distinctly to set aside the whole proceedings, by a single judgment, and is therefore not a collateral proceeding. Had these plaintiffs brought their action at law, and attached the property of Stone as their debtor, and the assignees had placed their title on the ground of the assignment under the authority of these insolvent proceedings, and the plaintiffs had attempted to sustain their right to attach, because the proceedings in insolvency were void, that would have been a collateral suit, within the meaning of the rule. But this summary proceeding, according to the course of chancery, is given by the original insolvent act, in the nature of an appeal, to any party aggrieved, in order that the validity of the insolvent proceedings may be drawn in question once for all, and sustained or reversed in whole. *Wheelock* v. *Freeman*, 4 Met. 504. Several other cases have been since before us, upon bills in equity to set aside proceedings in insolvency, on the ground that it is the appointed and appropriate mode of determining the legality of the proceedings, and by one judgment affirming or reversing them.

On the whole case, the court are of opinion, that the injunction to stay all proceedings must be made perpetual.

Decree accordingly.

NOTE. By the Gen. Sts. *c.* 119, § 4, in case of a vacancy in the office of judge, the duties shall be performed in the same county by the judge of any other county designated by the register. And by *St.* 1860, *c.* 70, all insolvency proceedings before Judge Hodges in the counties of Worcester and Franklin, so far as they were ineffectual or invalid for want of jurisdiction or authority of said Hodges under the *St.* 1856, *c.* 284, § 5, are "confirmed, and the same shall be taken and deemed good and valid in law to all intents and purposes whatsoever"

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Henry D. Stone *vs.* Rufus Carter.

Under the St. of 1857, c. 141, § 17, no person can be arrested on mesne process, if the affidavit of the creditor "that he believes the defendant has property not exempt from being taken on execution," omits to add "which he does not intend to apply to the payment of the plaintiff's claim," or to state not only that the creditor believes, but that he "has reason to believe, the defendant has property," &c.

Petition for a writ of *habeas corpus*, by one committed to the jail of the county of Worcester under two warrants of commitment for contempt, signed by Charles Mattoon, judge of insolvency for the county of Franklin, who, ever since the 1st of July 1858, had acted as judge in the proceedings in insolvency in this county in the case of this petitioner, which were commenced before Judge Hodges, as stated in the next preceding case of *Grafton Bank* v. *Bickford*, *ante*, 564.

The case was submitted to the decision of the court upon the arguments made in that case, and the court, after deciding that said proceedings in insolvency were invalid, (*ante*, 574,) granted this writ.

The jailer returned that he held Stone on said warrants of commitment; and also on nine mesne processes, sued out from the court of common pleas in 1858 in actions of contract.

Upon each of these writs was indorsed an affidavit of the plaintiff, or of some person in his behalf, that he "has a good cause of action against the defendant within named, and a reasonable expectation of recovering a sum amounting to twenty dollars; and believes, and has good cause to believe, that said defendant intends to leave the State, so that execution, if obtained, cannot be served upon him; and that he believes said defendant has property not exempt from being taken in execution," adding, upon six of the writs, but not on the other three, "which he does not intend to apply to the payment of the plaintiff's claim."

Upon each of said six writs was a certificate of the judge of insolvency of Worcester county, in this form: "Personally appeared the above named J. S. before me, subscribed the above

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affidavit, and made oath to my satisfaction of the truth of the same; and I certify that, after due hearing, I am satisfied there is reasonable cause to believe that the allegations in said affidavit are true." Upon each of the other three writs was a substantially similar certificate of the judge of the police court of the city of Worcester.

A hearing was had on the 8th of February before the chief justice, who held, that the proceedings of insolvency not having been legally commenced, the commitments for contempt were of course invalid; but inclined to the opinion that the other processes, or at least the first six, were sufficient to hold the prisoner; and adjourned the case before the full court, before whom the case was argued the same afternoon.

F. H. Dewey, for the petitioner. The *St.* of 1857, *c.* 141, § 17, prohibits any arrest in an action of contract, without an affidavit of the plaintiff, or of some person in his behalf, and proof to the satisfaction of one of the magistrates therein named, "that he believes, and has reason to believe, the defendant has property not exempt from being taken on execution, which he does not intend to apply to the payment of the plaintiff's claim;" and requires such affidavit, "and the certificate of the magistrate that the same is true," to be annexed to the writ.

The affidavits and certificates upon these writs were manifestly framed under the *St.* of 1855, *c.* 444, and not under the *St.* of 1857, *c.* 141, which affords the debtor additional protection against arrest.

1. Upon three of the writs, they are fatally defective in omitting, after stating that the "defendant has property not exempt from being taken in execution," to add, "which he does not intend to apply to the payment of the plaintiff's claim." The *St.* of 1857, *c.* 141, § 17, differing from the *St.* of 1855, *c.* 444, § 11, makes, not the having property, simply, but the intention not to apply it in payment of the plaintiff's claim, a sufficient cause for arrest.

2. In all the cases, the affidavits and certificates are defective in omitting to state, not only that the person making the affidavit believes, but that he "has reason to believe," that the

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defendant has property, &c. Under the *St.* of 1857, again differing from the *St.* of 1855, mere belief is not sufficient. There must be reason to believe; and that must be proved to the satisfaction of a judicial officer. Proof of belief does not involve proof of reason to believe. A party may believe without reason. The distinction is a familiar one in the provisions of the insolvent laws respecting preferences.

E. B. Stoddard, T. L. Nelson & A. Dadmun, for the creditors. The first six processes are sufficient to hold the petitioner. The *Sts.* of 1855, *c.* 444, and 1857, *c.* 141, so far as they relate to arrest on mesne process, are identical. Both abolish imprisonment for debt, except in cases of fraud; define fraud as wilful and intentional neglect to apply property, not exempt from being taken in execution, to the payment of debts; and require, as an essential prerequisite to taking the debtor's body, that he should have committed an act of fraud, and that the magistrate should so find. The *St.* of 1857 was but a reënactment of the previous statutes, and was designed to change the law only where doubt and uncertainty had arisen under former legislation. Belief, without a reason for it, cannot exist. Under the *St.* of 1855, the magistrate must have satisfied himself that the creditor had reason to believe, &c., before he could judicially determine that the creditor's allegation of such belief was true; and this finding is all that is required by either statute, and sufficiently appears upon the affidavits and certificates.

The Court, after a brief consultation, discharged the prisoner from the three writs which omitted the averment of his not intending to apply his property to the payment of the plaintiff's claim; and remanded him, for an opportunity of further consultation upon the other processes; and on the next day discharged him from those also.

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Paine Aldrich *vs.* Ralph Earle & wife.

On the trial of a writ of entry, under *St.* 1844, *c.* 107, against husband and wife, to assert the title of a creditor of the husband to property alleged to have been conveyed to the wife in fraud of his creditors, declarations of the husband, made after the conveyance, are inadmissible against the wife to prove such fraud.

Writ of entry to perfect the demandant's title to a parcel of land in Worcester conveyed by David S. Messinger to Mrs. Earle on the 12th of June 1857, in exchange for a simultaneous conveyance from Mrs. Earle to him of another parcel of land. On the 5th of June 1858, the demandant specially attached the demanded premises, according to the provisions of *St.* 1844, *c.* 107, as Earle's property, in an action against him on a debt due at the time of said conveyances, and recovered judgment, and levied the execution on the premises in July 1858. The defendants jointly pleaded *nul disseisin*.

The case was tried in this court at April term 1859, and reserved, after a verdict for the demandant, upon a report, so much of which as states the point passed upon by the court was thus:

"The demandant introduced evidence tending to show that the demanded premises were conveyed to Mrs. Earle with the design and for the purpose of fraudulently securing the same from attachment by the creditors of Ralph Earle, and delaying, defeating or defrauding such creditors.

"In the course of the trial, the demandant offered the testimony of a witness, for the purpose of impeaching the title of Mrs. Earle, upon the issue of fraud, to the declarations of Ralph Earle, made to the witness in October 1857, in the absence of Mrs. Earle, to the effect that the property was conveyed to his wife because the times were coming on hard, and he wished to secure something to himself and to make some provision for his family. The tenant objected to the admission of this evidence. But the objection was overruled by the presiding judge, and the evidence admitted."

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T. L. Nelson, for the tenants.

F. H. Dewey, for the demandant. In order to maintain this action, it was necessary for the demandant to show a fraudulent intent upon the part of Ralph Earle in procuring the conveyance to his wife. Ralph Earle was a party to the record; he was a tenant defending this suit, jointly with his wife; his admissions then were clearly admissible, though made subsequently to the conveyance. 1 Greenl. Ev. §§ 172–175. *Hodges* v. *Hodges*, 2 Cush. 455. *Burke* v. *Miller*, 7 Cush. 547. *Hurst* v. *Robinson*, 13 Missouri, 82. A fraudulent conveyance may be proved by declarations of the parties in each other's absence, after ground for supposing a fraudulent combination has been established. *M'Kee* v. *Gilchrist*, 3 Watts, 230. The declarations of a vendor after sale may be given in evidence, if he remains in possession and control of the property. *Helpick* v. *Stone*, 17 Penn. State R. 143. In questions of fraud, considerable latitude is indulged in the admission of evidence. *Benham* v. *Cary*, 11 Wend. 84. The facts, admitted in this case, that Mrs. Earle received the conveyance without any consideration on her part, and that Ralph Earle has been and is in possession of the premises, distinguish this present case from many others. If the evidence was admissible for any purpose, a new trial should not be granted.

The decision was made at Boston in June 1860.

Bigelow, J. The rule is well settled, that the declarations of a grantor, made subsequently to the execution and delivery of a deed, are inadmissible to prove that the title of his grantee is invalid, as being fraudulent against the creditors of the grantor. *Bridge* v. *Eggleston*, 14 Mass. 250. *Foster* v. *Hall*, 12 Pick. 99.

The present case comes within this rule. The declarations of the husband, which were admitted in evidence, were made long after the conveyance; and they were offered, not as affecting his rights or interest in the estate, or as the declarations of a party to the record, but for the purpose of impeaching the title which his wife had acquired under his deed. This title was in her own right, though acquired through his instrumentality, and

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was held independently of her husband. He had no legal right or power to control or affect it after it became vested in her. There is nothing in the relation of husband and wife, in the absence of proof of agency or other direct authority, which authorizes the husband to disparage, by his acts or declarations, the title of his wife in real property to which she is entitled in her own right. *New trial ordered.*

JOHN W. DRAPER *vs.* SALEM T. WELD & others.

Evidence of what was said, in the absence of the payee of a promissory note, by one who had signed it on its face, to induce another to sign it on the back, is inadmissible to show that the latter put his name on the note with authority to fill up the blank with a guaranty only. And the admission of such evidence is not cured by a subsequent finding of the jury that the signature was put on the back of the note before it was delivered.

Giving time to one of two sureties on a promissory note does not discharge the other, although the first has signed his name upon the face, and the other on the back of the note.

ACTION OF CONTRACT against Weld, McGregory and Stevens, as joint and several makers of this promissory note:

"Sturbridge, Feb. 24, 1857. $1,000. With interest after date, I promise to pay to the order of John W. Draper, on demand, ten hundred dollars, value received.

"Salem T. Weld,

"Ebenezer McGregory."

Signed on the back "M. R. Stevens."

No service was made on Weld, he being out of the Commonwealth. McGregory was defaulted. Stevens answered that he signed the note as a guarantor only; and that after such signature, and after the note was by its terms payable, the plaintiff agreed with McGregory, for a valuable consideration, to extend the payment of the note till the 1st of January 1858, by means whereof Stevens was discharged from any liability thereon. Trial in the court of common pleas at March term 1859, before *Sanger*, J., who signed this bill of exceptions:

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"It was not controverted that Weld and McGregory were original promisors. But Stevens contended that he was not liable in that form; but that he signed the note some days after the plaintiff had paid the money on it to Weld, and after the plaintiff had accepted the same and agreed to hold it as a valid note against Weld and McGregory; and that, if liable at all, he was liable as a guarantor.

"The plaintiff testified that the note was handed to him on or about the 4th of March 1857, and not later than the 6th of March, by Weld; that the names of McGregory and of Stevens were then upon the note; that he then paid the money to Weld and took the note into his possession, and had held it ever since; that he never had the note in his possession till that day; and that on that day he saw Stevens in the village of Fiskdale in Sturbridge, where the money was paid and where Weld resided. Stevens then resided at Newton, and McGregory at Longmeadow.

"The defendant Stevens testified that he was at Fiskdale only once in the spring of 1857, which was on the 17th of March; that he was then in the hotel at Fiskdale, and saw the plaintiff and Weld talking together in the street, and saw the plaintiff hand Weld a paper; that Weld came into the hotel, and brought with him the note in suit; and that he signed the note at that time, at the request of Weld. He also testified, the plaintiff's counsel objecting, that when Weld came into the hotel, Weld said to him that the plaintiff had lent him the money on this note some time before, and that the plaintiff said or had agreed he would let it lie a while longer if Stevens would indorse the note, and that he (Stevens) thinking that Weld and McGregory were good for a thousand dollars for that length of time, signed the note, and did not expect to hear from it again. The defendant's counsel contended that what Weld told Stevens was admissible for the purpose of showing that the defendant put his name on the note with an authority to fill up the blank with a guaranty only.

"There was evidence tending to show that McGregory and Stevens were sureties; and the defendant was permitted to

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introduce evidence to prove that the plaintiff, in the month of August 1857, made an agreement with McGregory, for a valuable consideration paid him by McGregory, to give him time till the first of January 1858 for the payment of the note.

"The defendant contended and asked the judge to rule, the plaintiff's counsel objecting, that the giving of time to McGregory, if proved, would constitute a good defence to the note on the part of Stevens; and the judge did so rule, and instructed the jury that if they believed that an agreement was made between the plaintiff and McGregory, for a valuable consideration, to extend the time for the payment of the note till the first of January, as testified of by McGregory, that would constitute a valid defence, and would prevent the plaintiff from recovering against Stevens.

"The jury, on retiring, were requested by the judge to pass upon two questions, and to be prepared to answer them when they came in: first, whether Stevens put his name upon the note before it was delivered to the plaintiff, and before the money was paid by the plaintiff to Weld; and second, whether an agreement was made between the plaintiff and McGregory upon a valuable consideration to give time to McGregory upon the note. The jury found a verdict for the defendant, and also found against the plaintiff on both the questions submitted to them. To which rulings and instructions the plaintiff excepts."

P. C. Bacon, for the plaintiff, to the point that giving time to McGregory, one of the makers of the note, constituted no defence for Stevens, cited Story on Notes, § 421; Chit. Bills, (10th Amer. ed.) 415; Edwards on Bills & Notes, 572; *Shed* v. *Pierce*, 17 Mass. 628; *Shaw* v. *Pratt*, 22 Pick. 305; *McAllester* v. *Sprague*, 34 Maine, 296; *Dow* v. *Tuttle*, 4 Mass. 414; *Fullam* v. *Valentine*, 11 Pick. 159; *Perkins* v. *Gilman*, 8 Pick. 229; *Gibson* v. *Gibson*, 15 Mass. 112; *Wilson* v. *Foot*, 11 Met. 287; *Story* v. *Foster*, 17 C. B. 215; *Dunn* v. *Slee*, Holt N. P. 399; *Ex parte Gifford*, 6 Ves. 805; Pitman on Principal & Surety, 131, 192; 1 Story on Eq. § 498.

G. F. Hoar, (*C. Devens, Jr.* with him,) for the defendant. 1. The jury have found, on competent evidence, and under rul-

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ings not objected to, that the signature of Stevens was placed upon the note after it had gone into effect—from which the law would imply a contract of guaranty only. *Tenney* v. *Prince*, 4 Pick. 385. By this finding, the evidence offered and admitted "for the purpose of showing that the defendant put his name on the note with an authority to fill up the blank with a guaranty only," became wholly immaterial. And so did the ruling as to the effect of the extension, as applied to any other liability of Stevens than as guarantor for the other signers.

2. Giving time to McGregory discharged Stevens from his liability; and this whether they were cosureties merely, or McGregory was a principal as to him. 6 Ves. (Amer. ed.) 809, note. *Mayhew* v. *Crickett*, 2 Swanst. 192. The manner of the signature is notice to the holder that the parties were joint and several promisors and the two latter were sureties. The note is, "I promise to pay." *Bryant* v. *Eastman*, 7 Cush. 113. *Pratt* v. *Maine*, 7 Cush. 253. *Hunt* v. *Adams*, 5 Mass. 358. *March* v. *Ward*, Peake R. 130. *Hemmenway* v. *Stone*, 7 Mass. 58. *Baker* v. *Briggs*, 8 Pick. 122.

For the several promise of McGregory, the creditor substituted a new contract, which Stevens never agreed to see performed, in whole or in part. That contract was inconsistent with Stevens's right to pay at once and call on McGregory for reimbursement, and inconsistent with his right at any time, on tendering indemnity, to use all legal or equitable remedies in the plaintiff's name. 1 Story on Eq. § 324. By Kent, C., in *King* v. *Baldwin*, 2 Johns. Ch. 562. *Wright* v. *Simpson*, 6 Ves. 734. *Ex parte Rushforth*, 10 Ves. 414. *Morley* v. *St. Alban*, 11 Ves. 22. Sir Samuel Romilly *arguendo* in 14 Ves. 162, approved by Lord Brougham in 3 Myl. & K. 191. It cannot help the plaintiff to say that the defendants were several promisors, as well as joint; for successive indorsers are several promisors, yet giving time to a prior indorser discharges a subsequent one. *Lynch* v. *Reynolds*, 16 Johns. 41. *Hutchins* v. *Nichols*, 10 Cush. 302. A release of one joint and several promisor discharges the other. *Nicholson* v. *Revill*, 4 Ad. & El. 675. *Cheetham* v. *Ward*, 1 Bos. & Pul. 630. Giving time to one of two promisors

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discharges a surety at law. Story on Notes, § 414. The agreement need not be such as would release the debt; it is sufficient if a breach of it would give the principal a right of action against the creditor. Story on Notes, § 413. *Greely* v. *Dow*, 2 Met. 176. Most of the reasons for discharging a surety when time is given to the principal, apply with equal force to the giving of time to a cosurety.

But McGregory and Stevens were not cosureties. The form of this note gave notice to the holder that the party signing on the back was surety for the parties signing on the face. As between themselves, Weld may have been principal and McGregory surety. But as between them and Stevens they were both principals. Signing in blank on the back of a note imports an engagement to see it paid, if the makers on the face do not. Although the holder may enforce it as a joint and several promise, as to the other makers it is a secondary and collateral contract merely. This is apparent from the principle that plaintiff may fill such blanks with a contract of guaranty, if he so elect, which would make the liability of the signer on the back secondary to that of the promisors. *Oxford Bank* v. *Haynes*, 8 Pick. 427. *Josselyn* v. *Ames*, 3 Mass. 274. *Moies* v. *Bird*, 11 Mass. 440. *Sumner* v. *Parsons*, 1 Dane Ab. 416. It cannot be that the plaintiff can have such election, if the parties are cosureties; as it would leave the rights and obligations of the other surety dependent on plaintiff. In many jurisdictions, such signature imports a second indorsement only. In *Chaffee* v. *Jones*, 19 Pick. 260, the only question submitted to the court was, whether the defendant would be liable at all for reimbursement, not having known of the plaintiff's signature; and it was there in evidence, that the note was given to take up a former note in which the parties were jointly liable.

The decision was made at Boston in June 1860.

Metcalf, J. The court are of opinion that Stevens ought not to have been permitted to testify — for the purpose of showing that he put his name on the note with authority to fill up the blank with a guaranty only — to what Weld said to him when he (Weld) went into the hotel at Fiskdale. This

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evidence would undoubtedly have a strong bearing on the minds of the jury upon the question whether the note was signed before it was delivered to the plaintiff. But for this purpose, so far as the plaintiff was concerned, it was hearsay testimony. It is said that it was restricted to "the purpose of showing that the defendant put his name on the note with an authority to fill up the blank with a guaranty only." But the answer is obvious, that if the defendant gave the note to Weld with his signature in blank, any limitation of the authority to fill up the blank could not affect the right of the plaintiff, to whom it was passed in that condition. For this reason, if there were no other, a new trial must be granted.

The court are also of opinion that the jury were wrongly instructed that giving time to McGregory, by the plaintiff, until January 1st 1858, for payment of the note, would prevent a recovery against Stevens. If, as between McGregory and Stevens, they were cosureties of Weld, the giving of time to one of them did not discharge the other, because the mere giving of time to one of two obligors, whose obligations are equal, will not discharge the other. *Dunn* v. *Slee*, Holt N. P. 399, and 1 Moore, 2. Burge on Suretyship, 156. Giving time by oral agreement to McGregory cannot have any greater legal effect than a covenant by a creditor not to sue, for a specified time, one of two or more joint debtors. Such a covenant is not a release, and it furnishes no defence to the other debtors. *Lacy* v. *Kynaston*, 12 Mod. 551. *Dean* v. *Newhall*, 8 T. R. 168. *Shed* v. *Pierce*, 17 Mass. 628. *Wilson* v. *Foot*, 11 Met. 285.

Exceptions sustained.

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City of Worcester *vs.* Inhabitants of Wilbraham.

In an action for the support of a pauper, whose settlement is proved to have once been in the town sued, the burden of proving that he since acquired a new settlement, under the Rev. Sts. *c.* 45, § 1, *cl.* 12, by residing for the space of ten years together in another town, is upon that town.

Absence from a town, without a definite purpose at all events to return to it as a home, will not interrupt the residence requisite to a settlement under the Rev. Sts. *c.* 45, § 1, *cl.* 12, until a new domicil is acquired elsewhere.

Action of contract for the support of a pauper, a widow, alleged by the plaintiffs and denied by the defendants to have had a settlement in Wilbraham. Trial in the court of common pleas, at March term 1859, before *Mellen*, C. J., who signed this bill of exceptions:

"The plaintiffs having proved, by an agreed statement of facts, that the father of the pauper's husband (from whom he had a derivative settlement unless he had gained one in his own right) had a settlement in Wilbraham, and that the husband of the pauper resided and paid taxes in the town of Chicopee, after he was twenty one years old, in the years 1832, 1833, 1835, 1836, 1837, 1838, 1839, 1840, 1841, 1842 and 1843, and that he was not taxed there in the year 1834, rested.

"There being then no evidence in the case tending to show whether the husband resided in Chicopee in 1834, the defendants contended and asked the court to rule, that it appearing that the husband resided and paid taxes in Chicopee in 1832 and 1833 and from 1835 to 1843 inclusive, the legal presumption would be that such residence, so commenced in 1832 and 1833, was continued; and that, as the case then stood, the presumption of law upon the facts would be that the husband gained a settlement in Chicopee, and that the burden was still upon the plaintiffs, in establishing the fact that the pauper had, at the time the supplies were furnished, a settlement in Wilbraham, to prove that the husband so removed from Chicopee at some time between 1832 and 1843 as to interrupt the continuity of residence for ten years together, called for by the Rev. Sts. *c.* 45, § 1, *cl.* 12.

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"The court declined so to rule; and ruled, that although the law presumed that a residence once acquired was continued, yet, the plaintiffs having proved that there was once a settlement in Wilbraham, the burden of proof was now upon the defendants to establish ten years' continuous residence in some other town; that the defendants must prove affirmatively that the husband's residence was in Chicopee the whole ten years, and that there was not such removal, without the intention to return, as would interrupt his residence; and that if the husband went away from Chicopee, during the ten years, without a fixed, affirmative and definite purpose at all events to return to Chicopee as his home, he would lose his residence, though he should afterwards return without having established a domicil elsewhere. To these rulings and refusals to rule the defendants except."

F. Chamberlin, for the defendants. 1. The court erred in refusing to rule, that from the fact that the pauper's husband resided and paid taxes in Chicopee in 1832 and 1833, and from 1835 to 1843 inclusive, the legal presumption would extend the residence over 1834. *Harvard College* v. *Gore*, 5 Pick. 375. *Kilburn* v. *Bennett*, 3 Met. 201. *Lewis* v. *Paine*, 4 Wend. 429. *People* v. *Manhattan Co.* 9 Wend. 351. 1 Stark. Ev. (1st Amer. ed.) 36. 1 Greenl. Ev. §§ 42, 371.

The ruling, "that the defendant must prove affirmatively that the husband's residence was in Chicopee the whole ten years, and that there was not such removal without the intention to return as would interrupt his residence," was erroneous, as calling upon the defendants to prove a negative which could not be affirmatively proved. The defendants having proved a change of the original domicil, the burden was upon the plaintiffs to prove that the second domicil had been intentionally abandoned. *Harvard College* v. *Gore*, 5 Pick. 375. *Orrell* v. *Hampden Fire Ins. Co.*, *ante*, 431.

2. The final instruction, as to what would amount to the abandonment of a residence, is opposed to the entire current of authorities. A domicil once fixed will continue to be the domicil of the party until a substitute is acquired; and notwith-

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standing the absence of the party and a temporary residence elsewhere. *Jennison* v. *Hapgood*, 10 Pick. 98. *Thorndike* v. *Barton*, 1 Met. 245, 246. *Sears* v. *Boston*, 1 Met. 252. *Kilburn* v. *Bennett*, 3 Met. 199. *McDaniel* v. *King*, 5 Cush. 474. *Bulkley* v. *Williamstown*, 3 Gray, 495. Story Confl. § 47.

D. Foster, for the plaintiffs. 1. In an action against a town to recover for the support of a pauper whose settlement was once in that town, the burden of proof that he afterwards acquired a settlement elsewhere is on the defendants. *Attleborough* v. *Middleborough*, 10 Pick. 378. *Oakham* v. *Sutton*, 13 Met. 192. *Dover* v. *Brighton*, 2 Gray, 482. Nor did the burden of proof shift because the defendants introduced evidence tending to show the acquisition of a new settlement in Chicopee. even if that evidence was sufficient, *prima facie*, to show that such new settlement had been gained. *Powers* v. *Russell*, 13 Pick. 69. *Morrison* v. *Clark*, 7 Cush. 213. *Phelps* v. *Cutler*, 4 Gray, 139. The burden of proof was on the defendants to show such a residence as created a settlement; and there was no evidence of any residence in Chicopee in 1834.

The defendants sought to prove a settlement acquired in Chicopee by the twelfth mode mentioned in the Rev. Sts. *c.* 45, § 1, under which the pauper must have resided there "for the space of ten years together." If during the ten years the pauper was absent, the burden of proof was upon the defendants to show that he went away *animo revertendi*. *Billerica* v. *Chelmsford*, 10 Mass. 394. *Athol* v. *Watertown*, 7 Pick. 42. *Fitchburg* v. *Winchendon*, 4 Cush. 190.

2. Any absence, however short, without an intention to return, interrupts the continuity of residence so as to prevent the acquisition of a settlement; and it is wholly immaterial whether a new domicil was acquired or the old domicil was lost. Residence and domicil are not identical under the pauper laws. *Westbrook* v. *Bowdoinham*, 7 Greenl. 363. *Exeter* v. *Brighton*, 15 Maine, 60. *Jefferson* v. *Washington*, 19 Maine, 302. *Warren* v. *Thomaston*, 43 Maine, 406. *Sears* v. *Boston*, 1 Met. 250. Story Confl. § 44.

This case was decided at Boston in June 1860.

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BIGELOW, J. 1. By the Rev. Sts. *c.* 45, § 3, it is provided that "every legal settlement shall continue till it shall be lost or defeated by acquiring a new one within this state; and upon acquiring such new settlement all former settlements shall be defeated and lost." The defendants in the present case, admitting that the pauper had a settlement through her husband originally in the town of Wilbraham, undertook to prove that he had acquired a new settlement in Chicopee in the twelfth mode prescribed by the Rev. Sts. *c.* 45, § 1, by a continuous residence in that town for ten years, and the payment of all taxes assessed on his poll or estate for five years within that time. This defence was in the nature of an avoidance of the case on which the plaintiffs relied to maintain their action. The defendants did not seek to meet and disprove the proposition of fact set up by the plaintiffs. The original settlement of the pauper's husband in Wilbraham was not denied; but the defendants sought to avoid its legal effect by alleging and proving the new and distinct fact, that the pauper had gained a new settlement in Chicopee, and thereby the original settlement in Wilbraham was "lost or defeated." In the strict and technical sense therefore, the burden of proof was on the defendants to establish satisfactorily that the husband of the pauper had acquired a new settlement in the manner alleged by them. *Attleborough* v. *Middleborough*, 10 Pick. 378. *Oakham* v. *Sutton*, 13 Met. 192. They had assumed the affirmative of this issue, and the duty of maintaining it by evidence rested on them throughout the trial.

2. But the instructions of the court, as to the proof necessary to show a continuous residence in the town of Chicopee within the meaning of the statute, prescribed too stringent a rule for the practical guidance of the jury in determining the question before them. Evidence of a temporary absence for a brief period, followed by a return to Chicopee, would not necessarily prove a change of domicil, or break the continuity of residence, so as to prevent the acquisition of a settlement there, although there was no proof of a fixed, affirmative and definite purpose to return, at the time the husband of the pauper left the town,

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or during his absence therefrom. A person cannot be said to lose his domicil or residence by leaving it with an uncertain, indefinite, half formed purpose to take up his residence elsewhere. It would be more correct to say, that he would not lose his residence until he had gone to a new one, with a fixed purpose to remain there and not to return to his former home. Until his purpose to remain had become fixed, he could not be said to have abandoned his former residence. *Bulkley* v. *Williamstown*, 3 Gray, 493. It was said in an early case, that the domicil of a party may be considered as remaining in a place when he returns to it after a temporary absence, too short to enable him to gain a residence elsewhere; because, in such case, it may be reasonably supposed that he absented himself with the intention of returning. *Chelsea* v. *Malden*, 4 Mass. 134. The error in the instructions in this case consisted in assuming that the mere absence of the party from the town in the year 1834 broke the continuity of his residence, unless the defendants could show affirmatively that he then had a fixed and definite purpose to return at all events to Chicopee as his home. Such temporary absence was only one fact bearing on the question of domicil or residence, and the jury would not be warranted in drawing from it the inference that the party thereby changed his home. The proper mode would have been, to have laid down the rule of law concerning the elements necessary to constitute a change of residence or domicil, and left it to the jury to determine, on all the facts in the case, whether such change had been made or not. *Exceptions sustained.*

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JOHN L. CARLETON *vs.* WILLIAM M. BICKFORD.

In an action in this state on a judgment of the court of another of the United States, a return of the officer in that action, that he made personal service on the defendant in that state, may be contradicted by parol evidence.

ACTION upon a judgment of the court of common pleas of the State of New Hampshire.

At the trial in this court, the plaintiff produced a certified copy of that judgment, by which it appeared that the defendant was described in the original writ in that action as of Worcester in this county and commonwealth; that the deputy sheriff who served the writ returned thereon that he had summoned the defendant "by giving him in hand a summons in the form prescribed by law;" and that judgment was rendered at the return term by default. No attachment of the defendant's property was made, and he had never been an inhabitant of New Hampshire.

The defendant then proposed to introduce evidence "that no summons had ever been given to him, as stated in the return of the officer, and that he never had notice nor knowledge of the commencement nor pendency of the said suit against him." But *Metcalf*, J., being of opinion that the return of the officer was conclusive upon these points, rejected the evidence, and directed a verdict for the plaintiff, and reserved the case for the consideration of the full court.

F. H. Dewey, for the defendant. The return of the officer was not conclusive, and the evidence offered should have been admitted. The result of the authorities is, that the question as to the jurisdiction of the person is one of evidence, on the trial of the action on the judgment. A judgment of another state is conclusive only as to matters adjudicated by the court; not as to matters not there passed upon, as of appearance by attorney, or the officer's return, the truth of which last is not even open to examination by that court. *Bartlet* v. *Knight*, 1 Mass. 409. *Bissell* v. *Briggs*, 9 Mass. 469. *Hall* v. *Williams*, 6 Pick. 240, 246. *Gleason* v. *Dodd*, 4 Met. 333. *Phelps* v. *Brewer*,

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9 Cush. 390. *Bissell* v. *Wheelock*, 11 Cush. 277. *Fullerton* v. *Horton*, 11 Verm. 425. *Bimeler* v. *Dawson*, 4 Scam. 536. *Rae* v. *Hulbert*, 17 Ill. 572. *Pritchett* v. *Clark*, 4 Harringt. (Del.) 280. Story Confl. (5th ed.) §§ 608, 609, & notes.

Great injustice would be the result, if a citizen of this state were concluded by a judgment obtained in another state without notice to him, leaving him no other remedy than a petition for a review there, or an action against the officer for a false return.

C. Devens, Jr. & G. F. Hoar, for the plaintiff. The settled construction of art. 4, § 1, of the Constitution of the United States, and the U. S. St. of 1790, *c.* 37, (1 Sts. at Large, 122,) requiring full faith and credit to be given to the judicial proceedings of other states, is, that in order that such a judgment should be conclusive, the court of the other state must have had jurisdiction both of the cause and the parties; but that the recitals of the record are to be taken as conclusive evidence of the facts therein stated. *Noble* v. *Gold*, 1 Mass. 410, note. *Bartlet* v. *Knight*, 1 Mass. 401. *Bissell* v. *Briggs*, 9 Mass. 462. *Commonwealth* v. *Green*, 17 Mass. 515. *Warren* v. *Flagg*, 2 Pick. 450. *Hall* v. *Williams*, 6 Pick. 232. *Gleason* v. *Dodd*, 4 Met. 333. *Ewer* v. *Coffin*, 1 Cush. 23. *Barringer* v. *King*, 5 Gray, 9. The case of *Starbuck* v. *Murray*, 5 Wend. 148, *contra*, is in opposition to the Massachusetts authorities, and founded on reasons manifestly unsound.

Unless the recitals of the record are conclusive evidence, there seems to be no substantial difference between a purely foreign judgment, and one of another state, except in the mode of authentication; and no force is given to the provision that full faith and credit shall be given to judicial proceedings of other states; for, in an action on a foreign judgment, the merits of that judgment are not open, if it is shown that the parties were regularly before a court of competent jurisdiction; and the record is *prima facie* evidence that they were so. *Galbraith* v. *Neville*, 1 Doug. 6, note. *Bank of Australasia* v. *Nias*, 16 Ad. & El. N. R. 717. Story Confl. §§ 606–608. 2 Kent Com. (6th ed.) 120, note.

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The cases in which it has been decided, that where the record sets forth an appearance by attorney, it may be shown that there was no authority, as in *Hall* v. *Williams* and *Gleason* v. *Dodd*, above cited, and *Aldrich* v. *Kinney*, 4 Conn. 380, do not conflict with this position; because the authority of the attorney is a fact independent of the record. A record that A. B. appeared by attorney amounts to no more than that an appearance was made, which purported to be on his behalf; as is shown by the fact, that an appearance by attorney may be explained even in a domestic judgment. *Bodurtha* v. *Goodrich*, 3 Gray, 508.

Undoubtedly this court must determine, by an inspection of the record, whether the defendant had notice of the suit in the other state. *Ewer* v. *Coffin*, 1 Cush. 23. But in this case, the record furnishes that evidence, and in the only way possible — by the return of the officer therein set forth, showing a delivery of summons to the defendant in person. "If it appears by the record," as said by Parker, C. J. in 6 Pick. 239, "that the defendant had notice of the suit," or, by Shaw, C. J. in 4 Met. 337, 338, that "he was personally summoned," it cannot be gainsaid. If the judgment is erroneous by reason of a false return, the remedy is in New Hampshire.

Shaw, C. J. The court are all of opinion that the evidence offered should have been admitted, on the ground that, if the facts were true which the evidence tended to prove, they would have shown that the court in New Hampshire had no jurisdiction of the person of the defendant, and therefore that the judgment against him by default was not binding on him.

We take it to be now well settled in this commonwealth, that although the judgment of a court of one state of the Union against a citizen of another state is *prima facie* evidence both of the jurisdiction of the court and of the merits, and notwithstanding the United States statute of 1790, providing that full faith and credit shall be given in each state to the judicial proceedings of another, yet such judgment is not conclusive; but it is competent for the defendant, when suit is brought against him on such judgment, to show by proof that the court, which rendered the judgment in the original suit, in point of

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fact had no jurisdiction over the persons of the parties and the subject matter of the controversy. *Bissell* v. *Briggs*, 9 Mass. 469. *Hall* v. *Williams*, 6 Pick. 232. *Gleason* v. *Dodd*, 4 Met. 333. *Bissell* v. *Wheelock*, 11 Cush. 277. *Bodurtha* v. *Goodrich*, 3 Gray, 508.

It was clearly so held in *Bissell* v. *Briggs*, and though *Hall* v. *Williams* is in some respects an authority the other way, yet, when well understood, it confirms the principle stated. In the latter case, the court seem to have been apparently perplexed between their own opinion upon principle, confirmed by the case of *Bissell* v. *Briggs*, on the one hand, and the respect due to what was then supposed to be the authority of the supreme court of the United States in *Mills* v. *Duryee*, 7 Cranch, 481, and *Hampton* v. *M'Connel*, 3 Wheat. 234, on the other.

In the case of *Hall* v. *Williams* the court held, in deference to the authority of the cases cited, that *nul tiel record* was the proper plea to debt on the judgment of another state. If it were the proper plea, it would follow that it must be the only proper plea; because that plea submits the whole matter to the court, and leaves no fact open to be tried on plea and proof, and nothing but the existence of the judgment and the identity of the parties, as in case of a domestic judgment. And yet the court in that case admitted some other pleas in bar, viz. that neither of the defendants was served with process; that one was not served with process; and *nil debet;* to which last plea the plaintiffs demurred. To the two other pleas the plaintiffs replied the judgment, by way of estoppel; to which the defendants demurred. The whole therefore came before the court on demurrer.

The court, however, strongly express their opinion, that in some form the question of jurisdiction ought to be open, before a citizen of another state can be held bound; and quote with approbation the dissenting opinion of Mr. Justice Johnson in *Mills* v. *Duryee*, "that jurisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance, or not subjected to their jurisdiction by being found within their limits." 7 Cranch, 486.

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And in that same case of *Hall* v. *Williams* the court decided that although the judgment of the Georgia court was a joint judgment against two, it appearing that only one was served with process, and being bad against the other, it was wholly void.

But, in view of subsequent decisions, we think that the court, in *Hall* v. *Williams*, attributed a larger effect to the opinion of the court in *Mills* v. *Duryee*, in regard to the conclusiveness of the judgments of one state in the courts of another, than it now appears the case warranted. In point of fact, in that case, the court in the original suit had full jurisdiction over the person of the defendant, and he had been arrested and gave bail for his appearance in that suit. The question before the court was a technical question of pleading. One of the judges dissented, on the ground that a case might occur in which a different plea would be proper, drawing in question the jurisdiction of the court rendering the judgment. But the case itself called for no limitation or qualification of the opinion, and none was given. It was therefore taken as authority, that in all cases the judgment of the court of another state had all the force and effect of a domestic judgment. This was reaffirmed a few years after, in a short opinion of Mr. Chief Justice Marshall, that *nil debet* was not a proper plea. *Hampton* v. *M'Connel*, 3 Wheat. 234. But no other authority is cited except *Mills* v. *Duryee*. And the learned reporter, in a note, questioned the authority of *Mills* v. *Duryee* as to the conclusiveness of the judgments of courts of other states, and considered it an open question.

The subject was much discussed in state courts; and subsequently it was decided by the supreme court of the United States, that congress did not intend, by the act of 1790, to declare that the judgment in one state against the person of the citizen of another, who had not been served with process or voluntarily appeared, should have such faith and credit in every other state as it had in the courts of the state in which it was rendered. They express the opinion, that congress did not intend to give the full force of domestic judgments to the judgments of courts of other states by the act of 1790; and expressed their concurrence with the various decisions of state courts, holding that

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congress did not intend that the statute should be so applied as to change the effect of judicial records of this description. *D'Arcy* v. *Ketchum*, 9 How. 390. That case was cited in a judgment of this court given by Mr. Justice Fletcher in the case of *Phelps* v. *Brewer*, 9 Cush. 390, which was very like the present.

We think therefore the authorities now concur in establishing the principle above stated, that a defendant, called on in an action to answer to a judgment rendered against him in the court of another state, may prove any facts tending to show that such court had no jurisdiction over him, so as to give effect to such judgment. Even if there were now any technical question of pleading, it would be removed by the practice act, dispensing with the rules of technical special pleading, and authorizing any legal defence to be made by answer and proof.

We can perceive no distinction in principle between this case and many of the cases, in which it was recited in the record that a party had appeared, that he had appeared by his attorney, and the like, but where he was still allowed to prove that the attorney made a mistake or committed a fraud, that in fact no attorney had appeared for him, that no attorney had been authorized to appear for him, as decided in the foregoing and many other cases. *Bodurtha* v. *Goodrich*, 3 Gray, 508. The acts and recitals of a court, not having acquired a jurisdiction, cannot be conclusively binding on him; nor can acts and recitals be conclusive evidence of facts which would give them jurisdiction. No more force and effect can be given to the certificate of a person purporting to be a deputy sheriff of another state, in giving the court jurisdiction over an absent party, than to similar acts of attorneys. To say nothing of the danger of false personation, and other devices, by which an officer of another state might be induced to believe that a stranger was the defendant against whom he had process, it seems to be giving quite sufficient effect to such a return to make it *prima facie* evidence, leaving the defendant the right to rebut it by evidence

New trial ordered.

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Harvey H. Cribbs *vs.* Alvin Adams & others.

A foreign bill of exchange or promissory note, payable at sight, is entitled to grace, by the general law merchant, unless the contrary is shown to be the law of the place where it is to be paid; and must therefore be presented for payment.

A notary cannot present a bill or note for payment by deputy, unless authorized by statute or usage of the place where the presentment is made.

Action of contract upon the following instrument, signed by the defendants:

"Adams & Co. Express and Banking Office, San Francisco, February 10, 1855. No. 63463. Exchange for $1800. At sight of this first of exchange (second and third unpaid) pay to the order of Harvey H. Cribbs eighteen hundred dollars, value received, and place to account of exchange. Adams & Co.

"To Messrs. Adams & Co. of San Francisco, New Orleans."

Across the face of the instrument were these words:

"Payable at the office of Benoist, Shaw & Co. N. O."

"Adams & Co. per R. Hereford."

There was evidence tending to show that Hereford was authorized to accept in behalf of the defendants.

The declaration contained two counts, one declaring upon the instrument in the usual form as upon a bill of exchange, charging the defendants as drawers, and alleging nonpayment; and the other declaring upon it as a promissory note of the defendants, payable at New Orleans, and alleging a demand of payment at New Orleans, and refusal.

The only evidence of a presentation and protest of said draft was the record of a notarial protest of said instrument, over the hand and seal of the notary, which was admitted, against the defendant's objection. "By this public instrument of protest," dated at New Orleans March 18th 1860, "Theodore Guyol, a notary public in New Orleans," over his official signature and seal, certifies that he on that day, at the request of the holder of the instrument now in suit, "by his deputy, W. G. Latham, presented the said draft to a clerk at the office of Benoist, Shaw

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& Co. in this city, where it is made payable, and demanded payment thereof, and was answered that no funds had been deposited there to pay the same."

Upon this case, *Metcalf*, J. advised a nonsuit, which was entered, subject to the opinion of the whole court.

C. H. B. Snow, for the plaintiff. 1. If this is to be construed as a bill of exchange, proof of acceptance is not necessary; for a bill drawn by one upon himself is to be regarded as an accepted bill. *Cunningham* v. *Wardwell*, 3 Fairf. 466. *Dougal* v. *Cowles*, 5 Day, 511. *Hasey* v. *White Pigeon Beet Sugar Co.* 1 Doug. (Mich.) 193.

The notarial protest of a foreign bill of exchange is evidence of the matters which it recites; and by it a due presentment of the bill, and a refusal for the reason that no funds had been deposited to pay it, are sufficiently shown. *Phœnix Bank* v. *Hussey*, 12 Pick. 483. Under the statutes of Louisiana, presentment by a deputy of the notary is sufficient. *Chew* v. *Read*, 11 Sm. & Marsh. 182. *Carter* v. *Union Bank*, 7 Humph. 548.

The bill was seasonably presented. *Muilman* v. *D'Eguino*, 2 H. Bl. 565. Notice was not necessary in this case to charge the drawer; because the drawer had no funds in the drawee's hands; and because the drawers and the drawees were the same persons. *Warder* v. *Tucker*, 7 Mass. 452. *Savage* v. *Merle*, 5 Pick. 88. *Baker* v. *Gallagher*, 1 Wash. C. C. 461. *Tarver* v. *Nance*, 5 Alab. 712. *Dollfus* v. *Frosch*, 1 Denio, 367. *West Branch Bank* v. *Fulmer*, 3 Barr, 399. *Roach* v. *Ostler*, 1 Man. & Ryl. 120.

2. But the instrument in question does not possess the essential requisites of a bill of exchange, and cannot be so regarded. Three parties are necessary to a bill of exchange, and here there are but two. A bill of exchange has also been defined as an assignment of a debt due to the drawer from a third person. Here the drawer stipulates to pay from his own funds. *Corser* v. *Craig*, 1 Wash. C. C. 424. *Mandeville* v. *Welch*, 5 Wheat. 277. *Debesse* v. *Napier*, 1 McCord, 106. This is a promissory note, and therefore needs no acceptance. Story on Notes,

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§§ 16, 209. Bayley on Bills, (2d Amer. ed.) 8. Chit. Bills, (10th Amer. ed.) 28. *Starke* v. *Cheesman*, Carth. 509. *Dehers* v. *Harriot*, 1 Show. 163. *Josceline* v. *Lasserre*, Fortesc. 282. *Roach* v. *Ostler*, 1 Man. & Ryl. 120. *Miller* v. *Thomson*, 3 Man. & Gr. 576. *Edis* v. *Bury*, 6 B. & C. 433. *Block* v. *Bell*, 1 M. & Rob. 149. *Shuttleworth* v. *Stephens*, 1 Campb. 407. *Davis* v. *Clarke*, 6 Ad. & El. N. R. 16.

By the common law, notes payable at sight are not entitled to grace, and therefore need not be presented for payment; and there is no evidence that the law of Louisiana is different. *Jones* v. *Fales*, 4 Mass. 245. *Barker* v. *Parker*, 6 Pick. 80. Rev. Sts. *c.* 33, § 5. *Carter* v. *Burley*, 9 N. H. 558. *Trask* v. *Martin*, 1 E. D. Smith, 505. *Janson* v. *Thomas*, 3 Doug. 421. No presentment, demand or notice was required in this case, and the action can be maintained as upon a simple promissory note payable on demand. Story on Notes, § 228 & note. *Payson* v. *Whitcomb*, 15 Pick. 212. *Carley* v. *Vance*, 17 Mass. 389. *Rugles* v. *Patten*, 8 Mass. 480. *Field* v. *Nickerson*, 13 Mass. 131. *Lyon* v. *Williamson*, 27 Maine, 149. *Silver* v. *Henderson*, 3 McLean, 165. Averring demand would not render proof of demand necessary. *North Bank* v. *Abbot*, 13 Pick. 465.

F. H. Dewey, for the defendants.

This case was decided at Boston in June 1860.

Bigelow, J. It is quite immaterial to the decision of this case, whether the contract declared on is regarded as a promissory note or a bill of exchange. In either case, being a foreign bill or note, and payable at sight, it was by the law merchant entitled to grace. Story on Notes, §§ 29, 224, 225 *a*. Chit. Bills, (10th Amer. ed.) 273, 365. If by the usage or law of the place where the contract was to be performed no grace was allowed, it was incumbent on the defendants to show it, as otherwise the rule of the general law merchant, as prevailing throughout the United States, must govern. *Wood* v. *Corl*, 4 Met. 203.

It was necessary therefore for the plaintiff to show that the bill or note was presented to the defendants for payment. Without such proof there was no evidence of a breach of the contract. The defendants, whether makers or acceptors, were not bound to

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pay until they had sight of the bill or note; because, until then, the time of its payment was not fixed by the commencement of the three days after sight, allowed for grace. Presentment was necessary in order to mark the time when the maker or acceptor was bound to make payment. The rule is, that where a promissory note or bill is payable on usance, months or days after sight, after notice, or at sight, it is essential to make presentment. Without it, by the terms of the contract, the money is not due and payable. Chit. Bills, 365. 1 Steph. N. P. 843. *Holmes* v. *Kerrison*, 2 Taunt. 323. *Sturdy* v. *Henderson*, 4 B & Ald. 592. *Dixon* v. *Nuttall*, 1 Cr. M. & R. 307, 4 Tyrwh. 1013, and 6 Car. & P. 320. *Thorpe* v. *Booth*, Ry. & Mod. 388.

The case at bar does not come within the rule that no presentment or demand upon the acceptor or maker is necessary, of a bill or note, payable at a particular place at a fixed time. In such case, the debt is payable at the time fixed by the contract, and no notice is required to render the duty of the debtor to pay it absolute. But where a bill or note is payable at sight, the time of the performance of the contract remains uncertain and indefinite until fixed by presentment and demand.

The only other question in the case is, whether the plaintiff offered sufficient evidence of presentment or demand of payment, in order to determine when the three days of grace would terminate, and the bill or note become payable. We think it very clear that there was no competent evidence of this essential fact. Assuming that the protest of a notary, if duly made, and containing a certificate of the presentment and demand by himself, would be admissible to prove it; the difficulty in the present case is, that the notary did not present the bill or note personally, but by his deputy, and so states the fact in his "instrument of protest."

By the common law, as we understand it, and according to the uniform practice in this commonwealth, the duties of a notary must be performed personally, and not by a clerk or deputy. He is a sworn officer, clothed with important public duties, which in their nature imply a personal confidence and trust. Chit. Bills, 458, 460. *Onondaga County Bank* v. *Bates*, 3 Hill,

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53. *Hunt* v. *Maybee*, 3 Selden, 266. *Kirtland* v. *Wanzer*, 2 Duer, 278. Doubtless, by well settled usage in some places, and in others by express provision of statute, notaries are authorized to employ clerks or deputies to perform official acts coming within the sphere of their duty, and are empowered to certify and authenticate their acts by their own notarial certificates, in like manner as if such acts had been performed by themselves personally. But such usage or provision of law is a fact to be proved by evidence. 1 Greenl. Ev. §§ 486, 488. Rev. Sts. *c.* 94, §§ 58, 59. At the trial of this case, the plaintiff offered no evidence to prove that a notary in Louisiana was authorized either by usage or statute to employ a deputy, or to authenticate his acts by his own certificate *Plaintiff nonsuit*

CHARLES FLAGG *vs.* CITY OF WORCESTER.

No action lies against a city for the injury occasioned to land bounding on a public street from the accumulation of water on the surface of the street, which the city has neglected to drain.

The remedy of an owner of land, for injury done to his land by the city by making an excavation in a public street, and thus turning the water accumulated thereon into a private drain running through his land, is by petition under the Rev. Sts. *c.* 25, § 6, and not by action of tort.

ACTION OF TORT. Trial before *Metcalf*, J., who reserved the case, by agreement of the parties, for the whole court, in whose opinion the substance of his report is stated. The decision was made at Boston in June 1860.

P. C. Bacon & H. Williams, for the plaintiff, to the point that the defendants were liable, under the first count, for having so laid out and constructed their streets as to cause the water to accumulate in large quantities thereon, and thence flow into the cellar, and upon the premises of the plaintiff, cited *Perry* v. *Worcester*, 6 Gray, 546; *Blood* v. *Nashua & Lowell Railroad*, 2 Gray, 139; *Anthony* v. *Adams*, 1 Met. 284; *Dodge* v. *County*

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Commissioners, 3 Met. 380; *Mellen* v. *Western Railroad*, 4 Gray, 301; and to the point that the defendants were liable, under the second count, for the making, by their street commissioner for the purpose of draining off the water which had accumulated in said streets, of an opening into a private drain, running through the plaintiff's premises, whereby his property was greatly injured, *Anthony* v. *Adams*, 1 Met. 284; *Sutton* v. *Clark*, 6 Taunt. 29; *Thayer* v. *Boston*, 19 Pick. 514; *Crocker* v. *Boston*, 5 Cush. 182; *St.* 1841, *c.* 115.

D. Foster & G. W. Baldwin, for the defendants.

Merrick, J. The declaration contains two counts. In the first, the plaintiff complains that his estate, abutting on Bowdoin Street, opposite Chestnut Street, has been injured by the water accumulated on those streets, for which he alleges that the defendants neglected to provide proper and suitable drainage, and, instead of doing so, suffered and permitted it to escape and flow from Bowdoin Street upon and across his land. And upon the trial it appeared from his testimony, which was in no respect controverted, that, during the time complained of, no provision was made by the city to drain the surface water accumulated by and upon those streets; but that water, thus accumulated, flowed over the surface of Bowdoin Street into and through his garden and premises, depositing thereon large quantities of gravel and earth, preventing its cultivation and substantially depriving him of its profitable use.

It is not alleged in the declaration, nor was any attempt made upon the trial to show, that Bowdoin and Chestnut streets were not in all respects, except in relation to the alleged deficiency in proper and suitable drainage, made, graded and finished so as to be safe and convenient for public use. The defendants therefore are not liable, upon the case stated and proved by the plaintiff, to compensate him for his alleged damage, unless all towns and cities are not only by law required, in the construction and maintenance of public highways, to provide such sufficient drainage for all surface water, that is, all such as is accumulated thereon by the falling of rain or the melting of snow, as will prevent it from thence flowing upon and injuring any con-

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tiguous estate; but are exposed to an action for all injuries which may thereby be occasioned.

Public highways are to be maintained and kept in repair by the towns or cities within which they are situated, so that they shall be safe and convenient for all persons lawfully travelling thereon. Rev. Sts. *c.* 25, § 1. This requisition, imposing upon all municipal corporations a serious and weighty obligation, by necessary implication authorizes them to do all acts necessary to the complete and faithful discharge of their duty in this particular. They may therefore bestow labor upon all parts of the located way, and make such changes in the natural surface of the soil as will add to the convenience or safety of the traveller. If, in consequence of such changes, the water accumulating upon the surface of the way, by the fall of rain or the melting of snow, passes on to adjoining lands in different places, or in somewhat greater quantities in particular places than it otherwise would have done, that is to be considered as one of the natural, probable or necessary consequences resulting from the establishment and maintenance of the way; and therefore no action will lie for such an injury, as for a tort, but the damage must be regarded as a matter contemplated in the location of the road, and compensation sought for by the owner of the property in the way pointed out by the statute. *Perry* v. *Worcester*, 6 Gray, 546. In this respect the rights of towns and of the owners of land adjoining a highway are not dissimilar to those of coterminous proprietors of land. The owners of land may improve their respective estates by cultivation, by erecting fences on the external lines, and by the erection of buildings thereon. All of these acts must necessarily, to some extent, more in some cases than in others, depending in each instance upon the peculiar formation of the surface, change the course and direction of the flow of surface water, and may thereby increase the quantity passing over an adjoining estate. But such consequences, being the necessary and unavoidable result of the lawful appropriation of land, give no right of action to the party supposing himself to be injured thereby. *Parks* v. *Newburyport*, 10 Gray,

In that case, the lot of the plaintiff, on which his dwelling-

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house stood, adjoined the lot of the defendants, which was in great part unoccupied otherwise than as an open school house yard. Afterwards the defendants erected upon their lot an engine house, and used part of the earth taken from the cellar under it, together with a quantity of gravel hauled from another place, to form an embankment about their building. In consequence of this, surface water coming from the higher part of the defendants' land was turned and diverted upon and over the land of the plaintiff; and it was for the injury caused by this diversion that the action was brought. But it was held by the court, that the action could not be maintained.

In like manner, it was the right of the plaintiff in this suit to change and improve his estate as he did, by erecting on his land, in the gorge or valley through which the surface water formerly passed, his dwelling-house, changing in that manner the passage of the surface water there from the place where it had formerly and naturally flowed. The location and maintenance of the highway did not alter or take away from him any right of causing or continuing such diversion. By raising an obstruction upon his own land, as he may lawfully do, he can still prevent the surface water from coming upon it; and if he thereby causes it to accumulate in the public highway, the city, if necessary to the safety and convenience of travellers, must provide, by drains or otherwise, the necessary means for its removal. As the defendants therefore have done nothing, except causing, by the construction of public highways, the diversion of the course of mere surface water; and as the plaintiff has the means and the right, by protecting his own estate by any necessary or convenient work or structure upon it, of avoiding the damage complained of; and, for so much of such damage as is incident to the establishment and maintenance of the way, has, or might have, received full compensation in the manner provided by law, upon its location; it is obvious that for the causes set forth in this count, no action can be maintained against them.

In the second count, the plaintiff alleges that the defendants unlawfully made an excavation and opened a drain within the

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limits of Bowdoin Street, for the purpose of drawing off the water which accumulated thereon, and thus caused the water to flow in great quantities into and upon his premises, by which the walls of his dwelling-house were undermined and he was otherwise much injured in his property. In support of this alleged cause of action, evidence, which was not contested by the defendants, was introduced by the plaintiff, tending to show that in 1854, when he became owner of the premises, there was a culvert under Bowdoin Street, leading from the Chickering lot on the southerly side of it into a drain on his own land; and that this culvert was built and constructed at the expense of the former proprietors of the two estates, and was by them intended and designed to be used solely for the purpose of draining and carrying off the surface water which should accumulate on the Chickering lot; and that afterwards, in the year 1858, the street commissioner of the city of Worcester, for the purpose of disposing of the water collected on the northerly slope of Chestnut Street and in Bowdoin Street, and for the purpose of improving and keeping those streets in repair, made the alleged excavation, within the limits of the last named street, into said culvert, and thereby emptied all said water into the same, by means of which greatly increased quantities of water were thereafterwards made to flow into and over his premises, to his serious disadvantage and damage. The defendants deny his right upon these facts to maintain any action against them.

It is well established by authorities and founded upon just principles, that when damage is necessarily done to the property of an individual by work authorized by public authority for public use, the work is not unlawful, and constitutes no tort, and no action will lie on account of it; but compensation for the damage must be sought by the owner of the property in the manner pointed out by law. *Perry* v. *Worcester*, 6 Gray, 546, 547. That principle is applicable to the present case.

By § 6 of *c.* 25 of the Rev. Sts. it is provided that "when any owner of land adjoining a highway shall sustain any damage in his property by reason of any raising, lowering or other act, done for the purpose of repairing such way, he shall have

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compensation therefor, to be determined by the selectmen of the town, or the mayor and aldermen of the city." The making of adequate provision, by work and labor upon the soil within the legally established boundaries of a highway, for the removal of water which collects upon it, to the inconvenience of travellers, whether it be by drains or ditches, or by the lowering of other parts of its surface, must undoubtedly be considered an act done thereon for the purpose of its repair. The excavation made by the street commissioner into the culvert on Bowdoin Street was obviously of this character and for this purpose, and therefore the remedy for any injury which was the consequence of it, to the property of any owner of adjoining land, must be sought for and obtained in the manner prescribed by the statute. That is by application to the mayor and aldermen to determine the damages, and the compensation to be made therefor; if their adjudication upon the question is not satisfactory, upon proper proceedings being had, they may be ascertained by a jury, as in the case of taking lands upon the location of highways. The repair of highways being not only authorized, but enjoined upon towns and cities; and this remedy being provided by it for the recovery of compensation for all injurious consequences resulting from acts done for such purpose; no action at law, having this for its object, can be maintained by the owner of adjoining land against the municipal corporation or any of its officers. But under this restriction no injustice can be done. To avail themselves of the remedy provided by the statute, ample opportunity is afforded to parties deeming themselves to be injured in their property. Their damages are in the first instance to be determined upon their own application to the selectmen of the town or mayor and aldermen of the city; and whether there is any limitation of time, by necessary implication, from all the various provisions of law upon the subject, (as none is in terms fixed by the statute,) within which such application is to be made, remains still an open question. Certainly they are to have a reasonable time; sufficient, at least, to enable them to determine whether the act of repair would result in a positive detriment to their estate.

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By the general statutes recently enacted, the right of making such application is limited to one year after the completion of the work complained of. Rev. Sts. *c.* 25, § 6. *Elder* v. *Bemis*, 2 Met. 599. *Brown* v. *Lowell*, 8 Met. 172. *Mitchell* v. *Bridgewater*, 10 Cush. 411. Gen. Sts. *c.* 44, § 19. It is obvious from these considerations that no legal cause of action is stated in the second cause in the plaintiff's declaration.

It is hardly necessary to remark, in addition to what has been said in reference to the allegations in the first count, that, as it is only surface water, which is liable to flow upon the plaintiff's land by means of the excavation into the culvert in Bowdoin Street, the plaintiff has a right to create any obstruction on his own premises, to prevent its entrance upon his land, or its passage through. The rules and principles of law in reference to the diversion of water accumulating by the fall of rain or melting of snow on the surface of the ground are essentially different from those which are applicable to streams flowing in channels between defined and actual banks. *Luther* v. *Winnissimmet Ferry*, 9 Cush. 174. *Mellen* v. *Western Railroad*, 4 Gray, 301 *Perry* v. *Worcester*, 6 Gray, 546. *Sprague* v. *Worcester*, *ante*, 193.

Upon the conclusion to which the court has arrived, the plaintiff, in pursuance of the agreement of the parties, is to become nonsuit.

GEORGE P. BRYANT *vs.* CHARLES H. ISBURGH.

A breach of an express warranty of soundness upon the sale of a horse authorizes the purchaser to rescind the contract and return the horse, although there was no express agreement to that effect, and no fraud.

ACTION OF CONTRACT to recover the price of a horse sold and delivered to the defendant by the plaintiff. Answer, that the plaintiff warranted the horse to be sound at the time of the sale; that the horse proved to be unsound, and was returned to the plaintiff. The plaintiff did not receive the horse back, but declined to do so.

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At the trial in the court of common pleas at December term 1858, the defendant asked the court to instruct the jury, "that if they should find from the evidence that a warranty was given at the time of the sale, and that there had been a breach of such warranty, the defendant would have a right to return the horse and rescind the contract, and that under such a state of facts they should return a verdict for the defendant."

But *Mellen*, C. J. refused to give the instructions asked for, and instructed the jury, "that the defendant had no right to return the horse and rescind the contract, in the absence of fraud on the part of the plaintiff, unless such were given by the terms of the contract; but that his proper remedy was an action for damages for the breach of warranty;" and "that if they should find there was a warranty and a breach of the same, they should then determine how much less the horse was worth by reason of the unsoundness, and deduct the sum so determined from the contract price, and return a verdict only for the balance." A verdict was returned for the plaintiff, with a deduction from the contract price of the horse; and the defendant alleged exceptions.

D. Foster & G. W. Baldwin, for the defendant. The purchaser of a horse, sold with a warranty of his soundness, has, even in the absence of fraud or an express agreement that he may do so, the right to rescind the contract and return the horse, for a breach of the warranty, when the consideration has not been paid. The Massachusetts decisions expressly assert this rule. *Kimball* v. *Cunningham*, 4 Mass. 502. *Conner* v. *Henderson*, 15 Mass. 319. *Bradford* v. *Manly*, 13 Mass. 139. *Perley* v. *Balch*, 23 Pick. 283. *Coolidge* v. *Brigham*, 1 Met. 547. *Clark* v. *Baker*, 5 Met. 452. *Henshaw* v. *Robins*, 9 Met. 83. *Dorr* v. *Fisher*, 1 Cush. 274. *Douglass Axe Manuf. Co.* v. *Gardner*, 10 Cush. 88. It is also supported by adjudged cases in several states, and by many books of authority. *Marston* v. *Knight*, 29 Maine, 344. *Reed* v. *Prentiss*, 1 N. H. 176. *Hyatt* v *Boyle*, 5 Gill & Johns. 121. *Franklin* v. *Long*, 7 Gill & Johns 407. *Melancon* v. *Robichaux*, 17 Louisiana, 101. 1 Dane Ab 177. 2 Kent Com. (6th ed.) 480. 2 Stark. Ev. (1st Amer. ed.)

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645. 1 Parsons on Con. 474. 2 Chit. Pl. (6th Amer. ed.) 100, 276, & notes. Story on Sales, § 422, note.

It was the rule in England prior to 1831. *Towers* v. *Barrett*, 1 T. R. 136. *Buchanan* v. *Parnshaw*, 2 T. R. 745. *Fielder* v. *Starkin*, 1 H. Bl. 17. *Curtis* v. *Hannay*, 3 Esp. R. 82. *Caswell* v. *Coare*, 1 Taunt. 566. The English cases, prior to *Street* v. *Blay*, 2 B. & Ad. 456, which seem unfavorable to the right of rescission, relate merely to the form of the action, and go on the ground that general assumpsit for money paid cannot be maintained, because it gives the defendant no notice that a question of warranty is to be tried. *Power* v. *Wells*, 1 Doug. 24, note, and Cowp. 818. *Stuart* v. *Wilkins*, 1 Doug. 18. *Weston* v. *Downes*, 1 Doug. 23. *Longchamp* v. *Kenny*, 1 Doug. 137. *Hulle* v. *Heightman*, 2 East, 147. *Payne* v. *Whale*, 7 East, 274. *Lewis* v. *Cosgrave*, 2 Taunt. 2. *Solomon* v. *Turner*, 1 Stark. R. 51 *Emanuel* v. *Dane*, 3 Campb. 299. *Thornton* v. *Wynn*, 12 Wheat. 188. But in the present case the consideration has not been paid, and the defence is interposed as an answer to an action to recover the agreed price, so that the reason of this objection fails.

The modern English cases, and other recent cases, which have denied the right to rescind, all follow the case of *Street* v. *Blay*, 2 B. & Ad. 456, in which the question was not necessarily raised, and the remarks of the court were mere *obiter dicta*, because the vendee had himself sold the property without warranty and repurchased it at a profit, so that the right of rescission was of course lost. In England, the courts have followed these *dicta* so far as to deny the right of rescission in cases of sale by sample, in which the rule in this state is clearly otherwise. *Dawson* v. *Collis*, 10 C. B. 523. The tendency of the courts of New York is the same. *Muller* v. *Eno*, 4 Kernan, 597.

The right of rescission is admitted to exist where there is fraud, or actual knowledge of the untruth of the warranty. But an express warranty renders the knowledge of the vendor immaterial, as is shown by the old form of declaring upon a breach of warranty in an action on the case for a deceit, where, if

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there was an express warranty, a *scienter* need not be laid; or, if alleged, need not be proved. *Salem India Rubber Co.* v. *Adams*, 23 Pick. 264. *Williamson* v. *Allison*, 2 East, 447. The reason given for introducing the form of declaring in assumpsit for a breach of warranty was, the convenience of adding the money counts.

That an action for damages is not an adequate remedy is obvious; because the warrantor may be insolvent, or the article purchased may be wholly useless to the purchaser, by reason of the defect.

The right to rescind a contract is the only adequate remedy to the party injured, and avoids circuity of action. It should therefore be allowed wherever the purchaser can say, "The article which you have sold me is not that which you pretended to sell, or I intended to buy."

Wherever there is a right to return, an offer to return is sufficient. *Thayer* v. *Turner*, 8 Met. 550.

P. C. Bacon & P. E. Aldrich, for the plaintiff. The ruling of the court of common pleas was according to the weight of authority, and the practice of business men. There is no adjudication in this state to the contrary; and this court should therefore establish harmony and convenience by adopting the rule established in England and New York, that where there is no sale by sample, or for a special purpose, no fraud, and no stipulation that the chattel may be returned, the purchaser cannot, at his option, rescind the contract. *Thornton* v. *Wynn*, 12 Wheat. 183. *Voorhees* v. *Earl*, 2 Hill, (N. Y.) 288. *Cary* v. *Gruman*, 4 Hill, 625. *Freeman* v. *Clute*, 3 Barb. 424. *Kase* v. *John*, 10 Watts, 107. *West* v. *Cutting*, 19 Verm. 536. *Perley* v. *Balch*, 23 Pick. 283. Parsons Merc. Law, 58. Sedgwick on Damages, (3d ed.) 286. 2 Smith's Lead. Cas. 15, note to *Cutter* v. *Powell*. *Street* v. *Blay*, 2 B. & Ad. 456. *Dawson* v. *Collis*, 10 C. B. 523.

Where there is no fraud, the understanding of the parties is, that the purchaser shall have the seller's liability if the chattel does not correspond to the warranty. The right of rescission, contended for by the defendant, is unfounded in principle, and

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would often operate inconveniently and unjustly in practice, especially in important commercial transactions; as in the case of a large sale of goods, sent to a distance, and returned, after the market price has varied, for a breach of warranty in a matter of inconsiderable importance.

This case was decided at Boston in June 1860.

METCALF, J. The precise question in this case is, whether a purchaser of personal property, sold to him with an express warranty, and taken into possession by him, can rescind the contract and return the property, for breach of the warranty, when there is no fraud, and no express agreement that he may do so. It appears from the cases cited for the plaintiff that in the English courts, and in some of the courts in this country, he cannot; and that his only remedy is on the warranty. See also 2 Steph. N. P. 1296; Addison on Con. (2d Amer. ed.) 272; Oliphant's Law of Horses, 88; *Cripps* v. *Smith*, 3 Irish Law R. 277.

But we are of opinion (notwithstanding a *dictum* of Parsons, C. J. in *Kimball* v. *Cunningham*, 4 Mass. 505) that, by the law of this commonwealth, as understood and practised upon for more than forty years, there is no such difference between the effect of an implied and an express warranty as deprives a purchaser of any legal right of rescission under the latter, which he has under the former; and that he to whom property is sold with express warranty, as well as he to whom it is sold with an implied warranty, may rescind the contract for breach of warranty, by a seasonable return of the property, and thus entitle himself to a full defence to a suit brought against him for the price of the property, or to an action against the seller to recover back the price, if it have been paid to him. In *Bradford* v. *Manly*, 13 Mass. 139. where it was decided that a sale by sample was tantamount to an express warranty that the sample was a true representative of the kind of thing sold, (and in which case there was no fraud,) Chief Justice Parker said "If a different thing is delivered, he" (the seller) "does not perform his contract, and must pay the difference, or receive the thing back and rescind the bargain, if it is offered him." This, it is true, was only a *dictum*, and not to be regarded as a decisive

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authority. But in *Perley* v. *Balch*, 23 Pick. 283, which was an action on a promissory note given for the price of an ox sold to the defendant, it was adjudged that the jury were rightly instructed that if, on the sale of the ox, there was fraud, *or an express warranty and a breach of it*, the defendant might avoid the contract by returning the ox within a reasonable time, and that this would be a defence to the action. In *Dorr* v. *Fisher*, 1 Cush. 274, it was said by Shaw, C. J., that, "to avoid circuity of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract and recover back the amount of his purchase money, as in case of fraud. But if he does this, he must first return the property sold, or do everything in his power requisite to a complete restoration of the property to the vendor; and without this he cannot recover." The chief justice took no distinction between an express warranty and an implied one, but referred, in support of what he had said, (with other cases,) to *Perley* v. *Balch*, cited above.

In 1816, when the case of *Bradford* v. *Manly* was before this court, and afterwards, until 1831, the law of England, on the point raised in the present case, was supposed to be as we now hold it to be here. Lord Eldon had said, in *Curtis* v. *Hannay*, 3 Esp. R. 82, that he took it to be "clear law;" and so it was laid down in 2 Selw. N. P. (1st ed.) 586, in 1807, and in Long on Sales, 125, 126, in 1821, and in 2 Stark. Ev. (1st ed.) 645, in 1825. In 1831, in *Street* v. *Blay*, 2 B. & Ad. 461, Lord Eldon's opinion was first denied, and a contrary opinion expressed by the court of king's bench. Yet our court subsequently (in 1839) decided the case of *Perley* v. *Balch*. The doctrine of that decision prevents circuity of action and multiplicity of suits, and, at the same time, accomplishes all the ends of justice.

Exceptions sustained.

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HENRY D. STONE & another *vs.* BENJAMIN WALKER & another

If two persons come together to an attorney to engage his services in defence of one of them on a criminal prosecution, *prima facie* that one is alone primarily responsible, and the liability of the other is within the statute of frauds, unless there was an original express promise on his part to pay for the services.

ACTION OF CONTRACT against Benjamin Walker and Comfort M. Walker, to recover for services rendered by the plaintiffs as attorneys at law in defending Comfort on a criminal charge. Trial in the court of common pleas at December term 1859, before *Mellen*, C. J., who signed this bill of exceptions:

"Stone, one of the plaintiffs, testified at the trial, that the defendants came to see him to obtain his services in said case, and that the defendant Benjamin Walker said to him, at the time, 'We want you to go to Southbridge, and take care of this case; they are abusing Comfort, and I mean to stand by him; I mean to assist him.' The said plaintiff further testified that he gave credit to both the defendants; that he knew Benjamin Walker; that he knew he was the uncle of Comfort M. Walker; that he was a responsible man; and that he did not know Comfort M. Walker.

"The evidence introduced by the plaintiffs and the defendants, as to what took place at the interview testified to by Stone, was conflicting; but it was not contended that any other interview took place between the parties with reference to the matter, except the one already mentioned.

"Benjamin Walker alone defended this action; first, on the ground that he never engaged the services of the plaintiffs at all; and secondly, that if he ever promised payment, it was a collateral undertaking to pay the debt of a third party, and was therefore void, not being in writing.

"The court instructed the jury, that as the services which were to be rendered were for the benefit of Comfort M. Walker, they must find that there was an original express promise on the part of the defendant Benjamin Walker to pay for the ser-

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vices; but that no precise form of words was necessary in which to make such a promise. The jury found a verdict for the defendants. The plaintiffs except."

D. Foster & P. P. Todd, for the plaintiffs. The instruction given was incorrect, and tended to divert the minds of the jury from the true issue; for if this was a special promise to answer for the debt of another, although made upon valuable consideration, and at the time when the contract was first entered into, (which is the only sense in which such a special promise can be "original,") then, however express in its terms, no action can be brought on it, because not in writing; and if, on the other hand, both defendants jointly contracted for the service to be rendered, then an implied promise to pay followed, and an implied promise need not be in writing. 1 Parsons on Con. 529, 538. *Goodwin* v. *Gilbert*, 9 Mass. 510. *Pike* v. *Brown*, 7 Cush. 136.

Upon the evidence in this case, the real question for the jury was, not whether the defendant promised payment, but whether he employed the services. If he did, the statute of frauds is no defence, although the services were for the benefit of another who joined in the same promise. The question is, not for whose benefit the promise was made, but who made it. Fell on Guaranties, *c.* 2, pl. 18, and *Scholes* v. *Hampson*, there cited. *Birkmyr* v. *Darnell*, 1 Smith's Lead. Cas. 134, & Amer. notes. *Simpson* v. *Penton*, 2 Cr. & M. 430. *Alger* v. *Scoville*, 1 Gray, 391. *James* v. *Spaulding*, 4 Gray, 451. *Nelson* v. *Boynton*, 3 Met. 396. *Chapin* v. *Lapham*, 20 Pick. 471. *Holmes* v. *Knights*, 10 N. H. 175. *Locke* v. *Brown*, 14 Maine, 108. *Leonard* v. *Vredenburgh*, 8 Johns. 29. *Farley* v. *Cleveland*, 4 Cow. 432. *Durham* v. *Manrow*, 2 Comst. 533. *Wainwright* v. *Straw*, 15 Verm. 215. *Hall* v. *Wood*, 4 Chandl. 36. Smith on Con., lect. 3, & notes. Browne on St. of Frauds, § 197.

C. Devens, Jr. & G. F. Hoar, for the defendants, cited Smith on Con., lect. 3; 1 Smith's Lead. Cas. 134, note to *Birkmyr* v. *Darnell;* 1 Saund. 211, note; *Leonard* v. *Vredenburgh*, 8 Johns. 29; *Burkmire* v. *Darnell*, 6 Mod. 248; *Matson* v. *Wharam*, 2 T. R. 80; *Anderson* v. *Hayman*, 1 H. Bl. 120; *Cahill* v. *Bigelow*, 18 Pick. 369; *Nelson* v. *Boynton*, 3 Met. 396; *Blake*

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v. *Parlin*, 22 Maine, 395; *Moses* v. *Norton*, 36 Maine, 113; 1 Parsons on Con. 490, note, & cases cited.

Shaw, C. J. This is a joint action against Benjamin Walker and Comfort M. Walker, for professional services done by the plaintiffs as lawyers and copartners. Comfort M. Walker was defaulted, and Benjamin alone defends, and the question is whether a joint promise was proved, binding on both defendants. The grounds of Benjamin Walker's defence are, 1st. That he never engaged the services of the plaintiffs at all; and 2d. That if he ever promised payment, it was a collateral undertaking to pay the debt of a third party, and was therefore void, not being in writing.

The provision in the statute of frauds, Rev. Sts. *c.* 74, § 1, is, that no action shall be brought, to charge any person upon any special promise to answer for the debt, default or misdoings of another, unless the contract or some memorandum thereof be in writing, signed, &c.

The court of common pleas instructed the jury that as the services to be rendered were for the benefit of Comfort — that is, to defend him against a criminal charge — they must find, in order to charge Benjamin Walker, that there was an original express promise on his part to pay for the services, but that no precise form of words was necessary, in which to make such promise.

The first object is to see if we understand this direction. The terms "original" and "collateral," as applied to undertakings in connection with the statute of frauds, though not found in the statute, are often used in applying it, and, being significant and intelligible, are convenient, as explained in *Nelson* v. *Boynton*, 3 Met. 400. If the promise is made by one in his own name to pay for goods or money delivered to, or services done for another, that is original; it is his own contract on good consideration, and is called original, and is binding on him without writing. But if the language is "Let him have money or goods, or do service for him, and I will see you paid," or "I promise you that he will pay," or "If he do not pay, I will," this is collateral, and, though made on good consideration, it is void by

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the statute of frauds, before cited. These distinctions, though somewhat close, are plain and intelligible, and are fully set forth with the authorities in support of them, in the case just cited.

With this view of the law, as expressed in the case cited and many others, the court are of opinion that the instruction given by the court to the jury was correct. As the service to be done was for Comfort alone, without something further than an ordinary retainer, he alone would be responsible. What therefore the court directed the jury was, that to charge Benjamin, they must be satisfied that Benjamin used some express words, by which he intended to engage and bind himself, as an original promisor, personally to pay for the services; but if the language did not amount to such express personal undertaking to pay, but only that he would pay if Comfort did not, then the promise was void by the statute. The judge added that no precise form of words was necessary to show a personal promise on the part of Benjamin. The necessary implication was, that if Benjamin made any express personal promise to pay for the services, or expressly engaged the plaintiffs on his own account to perform the services, then it was an original promise, and he would be liable; otherwise, he would not.

It appears to us that this instruction was correct, and well adapted to the circumstances of the case. There was conflicting evidence of what took place at the only interview, at which the undertaking, whatever it was, was entered into. Probably no evidence made the case stronger for the plaintiffs, than the plaintiff Stone made it by his own testimony. He testified that the defendants came to see him to obtain his services in a case against Comfort, on a criminal charge, and the defendant Benjamin Walker, the uncle, said, "We want you to go to Southbridge, and take care of this case; they are abusing Comfort, and I mean to stand by him; I mean to assist him."

The language itself was somewhat equivocal, purporting rather an intention to afford him the aid which he needed, to be his bail, and stand his surety; though it might well be aided and explained by other evidence of what took place at the same time. And though that evidence was conflicting, it was

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for the jury to weigh it, and determine which statement was best entitled to credit; and from all the facts which, on the evidence, they should find true, to decide whether the undertaking of the defendant Benjamin was personal and original to pay absolutely, or collateral and conditional, to pay if Comfort should not. It was rightly left to the jury under proper instructions, and therefore the verdict must stand. *Exceptions overruled.*

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SUPPLEMENT.

Under the *Sts.* of 1857, *c.* 284, 1858, *c.* 77, and 1859, *c.* 108, at the expiration of the term of imprisonment of a convict, as reduced by his good conduct as appearing on the prison record, according to the scale of deduction provided in those statutes, he is entitled to be discharged by the warden of the state prison, or the keeper or overseer of the house of correction, without a pardon.

On the 1st of August 1859, it was ordered by the governor and council that the opinion of the justices of the supreme judicial court be required upon the following question:

"Whether the warden of the state prison, or the keeper or overseers of a house of correction, may lawfully discharge a convict, before the expiration of his original sentence, in case it appears by the record, kept in accordance with the provisions of *St.* 1857, *c.* 284, *St.* 1858, *c.* 77, and *St.* 1859, *c.* 108, that such convict is, by reason of good conduct, entitled to the benefit of said acts; or whether an executive pardon is, in such cases, also necessary to authorize the convict's discharge?"

We the undersigned, justices of the supreme judicial court, in answer to the above written question proposed to them by the governor and council, respectfully ask leave to submit the following opinion:

The question proposed depends mainly upon the just construction of the act of 1857; for the statute of 1858 and that of 1859, though they add some provisions, do not substantially affect the construction of the original act.

The first provision relates to the monthly record, which the warden of the state prison is required to make, of the conduct of each convict. The object is to determine whether the convict has observed all the rules and requirements of the prison, and has not been subjected to punishment. We do not sup-

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pose that these are two distinct subjects of inquiry and record — faithful observance of the rules, and exemption from punishment — but only two modes of stating the inquiry; so that, if in looking over the daily journal on which delinquencies and punishments are noted, there is no punishment against a convict during the month, the conclusion will be that he has faithfully observed the rules, so that he will be entitled to a favorable record. Such a record the law contemplates to be made at or soon after the end of each month.

The next essential provision is, that "for every month that such convict shall appear by such record to have observed all the rules, and not have been subjected to punishment, there shall be a scale of deduction from the term of such convict's sentence, in the following proportion" — stating it.

The first question is, whether this act gives a right to the convict to have his term of imprisonment reduced and shortened by such scale; or, in other words, whether these provisions of law bear upon the sentence and shorten the term of imprisonment. We think they do. They afford an assurance of the highest character that, upon condition of good behavior, the convict shall have the promised benefit of an earlier release. We are aware that the words are not explicit that the term of imprisonment shall be reduced, but we think they are equivalent. The words are, "there shall be a scale of deduction from the term of such convict's sentence." It appears to be equivalent to an express provision that there shall be a deduction from the term of imprisonment, according to the scale so to be formed.

According to this construction, the sentence, which is imposed by force of one law, is modified by the present law; so that, prior to the present, the time of imprisonment would be computed according to the words of the sentence, and be discharged at its termination by lapse of time; under the present, it will terminate by the time declared in the terms of the sentence, diminished by the number of days for which the convict will be entitled to deduction. Such a deduction, especially in the case of the long sentences, when it is one sixth part of the whole, becomes an essential legal element in the sentence itself, by which the convict is held; and the convict, by complying

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with the terms of the law in maintaining his good conduct, thereby earns a right to the promised benefit.

If it be objected, that this will render the subsistence of the sentences uncertain, we think not, if the provisions of the act are rightly understood and observed. The scale of deduction is not to depend on any varying or capricious notions, which any officers or superintendents of the prison may entertain of the good behavior or good disposition of a convict; it is made to depend upon a fact, ascertained by a fixed rule, entered on the journals of the prison, recorded each month, that is, entered in a book permanent in its character, fixed and unchangeable when once entered; these books of record are always accessible, and although the officers may all change, the record is there.

The mode of ascertaining when the term of imprisonment will expire will be somewhat more complicated, than that of ascertaining when a common sentence will expire. But it depends upon certain data to compute from — a computation by the simple rules of arithmetic — and therefore the result must be certain.

In looking at the second section of this act, and finding the provision that the record, directed to be kept by the warden, shall be submitted once in three months to the governor and council, that the same may be considered by them in the exercise of the executive clemency in behalf of each convict, we might, at first view, be led to the conclusion that this was the main purpose of the act, and that the design of the statute was, whether the reduction of sentence were deemed matter of right or favor to the convict, that it should come in the form of executive clemency or pardon.

But, upon a careful consideration of that provision, we are of opinion, that the benefit promised, in consideration of good behavior, was intended to be an actual reduction of sentence, as a right, and not as a favor; it therefore operated upon the sentence itself; and that this second section had another and distinct object. This conclusion is derived, to some extent, from the section itself. After providing that the record to be kept by the warden shall be laid periodically before the governor and council, it is added, " that the same may be considered by them in the exercise of the executive clemency on behalf of each con-

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vict, if they shall deem the same conducive to the interests of the prison, and promotive of the reformation and welfare of the convicts confined therein."

It imposes no duty upon the governor and council, to act in regard to any particular convict; but it is to enable them, with better means of judgment, to exercise the discretionary power of pardoning vested in them by the Constitution, and to be exercised with a view to general interests. The object appears to us to be, to hold up to convicts a still further encouragement to good behavior, beyond the promised diminution of sentence, by selecting those for executive clemency, especially from those who are sentenced for long terms, who appear by the record to have conducted themselves uniformly or generally well. The declared object of this provision is, to enable the governor and council to exercise the power of pardon with a view to the interests of the prison and the welfare of the convicts.

The subsequent acts, so far as they may be regarded as legislative interpretations of the first act, tend to confirm the views we have thus taken.

The *St.* of 1858, *c.* 77, provides that keepers of jails and masters of houses of correction shall perform all the duties required by the first section of the former act of the warden of the state prison. And convicts in such jails and houses of correction shall be entitled to all benefits therein secured to convicts in the state prison. If it was the duty of the warden of the state prison, not only to keep the required record, but to discharge convicts earlier than the time fixed by their sentences, according to the scale formed from such record, then, by force of this act, the latter, as well as the former, is required of keepers of jails and houses of correction. And in no other mode can convicts in jails and houses of correction enjoy the benefits secured to them by this act. And further, no provision is made by this act for any return to be made to the governor and council; nor is it embraced by reference to the former act, which reference is only to the first section. This carries a strong implication that the convicts are to receive the promised benefits, through the keepers of jails and houses of correction, by an earlier discharge than the terms of their sentences would warrant

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The *St.* of 1859, *c.* 108, provides that the record, provided to be kept in jails and houses of correction, of the conduct of prisoners, shall be submitted to the sheriff and overseers of the houses of correction, and, where there are no overseers, to the sheriff and county commissioners, "to be considered by them in recommending prisoners for the exercise of the executive clemency."

These officers, of course, have no controlling power in regard to pardon; and the obvious purpose of the statute, in requiring the record to be reported to them, is to enable them to act more intelligently in recommending persons for pardon, and cannot be the means contemplated by the statute under consideration, for carrying it into effect, by reducing the sentences of prisoners.

In more direct answer to the question proposed, the opinion of the undersigned is, that the warden of the state prison and the keepers of jails and houses of correction may lawfully discharge a convict before the expiration of his original sentence, in case it appears by the record, kept in accordance with the several statutes above cited, that such convict is, by reason of good conduct, entitled to the benefit of said acts; and that an executive pardon is not necessary in such cases to authorize the discharge of the convict.

LEMUEL SHAW,
CHARLES A. DEWEY,
THERON METCALF,
GEORGE T. BIGELOW,
PLINY MERRICK,
EBENEZER R. HOAR.

Boston, 20th August, 1859

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ABATEMENT.

An action on the Rev. Sts. *c.* 104, commenced by one who has only a life estate in the land sought to be recovered, is abated by his death. *Brown* v. *Kendall*, 979.

See APPEAL, 2; PLEADING, 8.

ACTION.

1. For breach of an agreement, for good consideration, to withdraw a suit, nominal damages may be recovered, without proof of actual damage. *Hagan* v. *Riley*, 515.
2. In an action on a judgment, a declaration which sets forth the recovery of the judgment, an issue of execution, and an acknowledgment of satisfaction by receipt of a note for the amount thereof, and that the note was by mistake written for a smaller sum than the amount of the execution, and that the judgment to that extent is unsatisfied, shows a good cause of action for the unsatisfied part of the judgment. *Canfield* v. *Miller*, 274.
3. An action of tort will not lie against a city for obstructing a stream to the injury of a mill, by the erection of a bridge, if the bridge is suitably constructed so as to let the water pass off with reasonable freedom, at all times, except in case of extraordinary freshets not occurring annually. *Sprague* v. *City of Worcester*, 193.
4. No action lies against a city for the injury occasioned to land bounding on a public street from the accumulation of water on the surface of the street, which the city has neglected to drain. *Flagg* v. *City of Worcester*, 601.
5. The remedy of an owner of land, for injury done to his land by the city by making an excavation in a public street, and thus turning the water accumulated thereon into a private drain running through his land, is by petition under the Rev. Sts. *c.* 25, § 6, and not by action of tort. *Ib.*
6. In an action of tort, brought by an insurance company, alleging that the defendant, after obtaining insurance from them, conveyed away the insured premises, and, upon a subsequent loss, falsely and fraudulently represented that he still had an interest in the premises, and thereby induced the company to pay him the amount of the loss, the jury were instructed that if the defendant, knowing that he had no title, concealed that fact from the company, and

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they were thereby induced to pay the money, and would not have paid it had they known the facts, then the money could be recovered back in this action. *Held*, that the defendant was entitled to a new trial. *Berkshire Mutual Ins. Co.* v. *Sturgis*, 177.

7. In an action for driving a horse, hired to drive to another town and back, "so immoderately that he became sick and died," there was evidence tending to show that overdriving of the horse, and want of due care of him, when exhausted and diseased, together occasioned his death; and the judge instructed the jury, against the defendant's objection, that if the horse was exhausted on his arrival at the other town, and refused to eat and drink there, and was not in a fit condition to drive, the defendant had no right to drive him back on the same day; that "to entitle the plaintiff to recover, he must prove that the death of the horse was produced by the overdriving, or the want of ordinary care on the part of the defendant;" and that if the death of the horse was produced partly by the misconduct of the defendant, and partly by the negligence of the plaintiff, the plaintiff was not entitled to recover; and refused to instruct the jury that if a cold taken by the horse, or other cause, coöperated with immoderate driving in producing the death, the burden of proof was on the plaintiff to prove that the second cause existed, or the cold was taken by the horse through the negligence of the defendant, and before he was redelivered to the plaintiff. *Held*, that these instructions and refusal were correct, and not open to objection, as leaving it to the jury to find a verdict for the plaintiff, on the ground of injury from want of care only, unconnected with immoderate driving. *Edwards* v. *Carr*, 234.

See ARBITRAMENT AND AWARD, 6; CONSTABLE, 1; CONTRACT, 2; CORPORATION, 2; EQUITY, 7, 8; NONSUIT; PROMISSORY NOTE, 1; TAX, 2.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVERSE POSSESSION.

See WAY, 13.

AFFIDAVIT.

See ARREST; EQUITY, 7; PLEADING, 7.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

APPEAL.

1. A creditor of the estate of a deceased person cannot appeal from a decree of the court of probate, refusing the petition of the administrator for leave to

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sell real estate of the deceased for the payment of debts. *Henry* v. *Estey*, 336.

2. No appeal lies to this court from the decision of the court of common pleas upon a demurrer to a plea in abatement. *Willard* v. *Stone*, 475.

3. A judgment of the court of common pleas, under the Rev. Sts. *c.* 103, § 31, confirming a report of commissioners appointed to make partition, is not within the *St.* of 1840, *c.* 87, prohibiting appeals except for matter of law apparent on the face of the record; but is subject to a general appeal to this court. *Buck* v. *Wolcott*, 268.

4. The fact that an appeal was taken can be proved by the record only; and not by the statements of the appellee in a complaint filed by him for affirmation of the judgment. *Moore* v. *Lyman*, 394.

See COSTS, 1; EXECUTOR, 5; JUDGMENT, 6; PLEADING, 6.

ARBITRAMENT AND AWARD.

1. Bonds of submission to arbitration recited that differences had arisen "concerning the matter that C. demands of D. possession of certain tracts of land," (described,) "which C. alleges D. has without law entered upon and disseised C., and still withholds the possession thereof from him; which differences and all demands concerning the same the parties have agreed to refer;" and stipulated that the parties should give deeds according to the award. *Held*, that it appeared with sufficient clearness that the matter submitted was the claim of one party to the possession of certain land withheld from him by the other, and that the difference between the parties concerned the true boundary line of their adjoining lots. *Caldwell* v. *Dickinson*, 365.

2. *Held*, *also*, that an award "that the north line, so called, between C. and D. shall be the line established by the survey of R., as exhibited by him at the hearing," and described in the award by metes and bounds, courses and distances, was a sufficient determination of the whole matter submitted. *Ib.*

3. *Held*, *also*, that such award was not invalidated by reciting that the submission was between B. and C. of the one part and D. of the other. *Ib.*

4. Awarding costs, which it is beyond the power of the arbitrators to do, is no ground for refusing specific performance of the residue of the award. *Ib.*

5. An action for trespass on land was referred, by rule of court, "with full authority to examine and establish boundary lines between the parties, about which there is any dispute, controversy or doubt;" and an award, giving damages and costs to the plaintiff, and establishing a boundary line by courses and monuments, was accepted by the court, and judgment entered thereon, notwithstanding the plaintiff's objection to so much of it as established a boundary, upon the ground that that provision was inserted in the submission by mistake and without his consent, and was protested against by him as soon as he discovered it. *Held*, that the boundary line so established was conclusive upon the parties in a subsequent similar action *Searle* v. *Abbe*, 409.

6. *It seems*, that where all matters in dispute are submitted to arbitration by mutual bonds to perform and abide by the award, and the award is that one party

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shall convey certain notes and accounts to the other, and shall recover a certain sum from the other in full of all demands, he may maintain an action on the other's bond, to enforce payment of that sum, without showing a transfer of the notes and accounts. *Loring* v. *Whittemore*, 228.

7. An award that one party to the submission is entitled to certain land does not require the other party to make any conveyance or assurance thereof to him. *Ib.*

8. The question how much a lessor shall pay a lessee for the surrender of his lease at a future day cannot be referred to arbitration by submission under the Rev. Sts. *c.* 114. *Hubbell* v. *Bissell*, 298.

9. On a submission under the Rev. Sts. *c.* 114, of the question how much a lessor should pay his lessee for the surrender of his lease at a future day, and of all other claims between the parties which could be the foundation of an action at law or a suit in equity, the referees awarded that the lessor should recover of the lessee a certain sum, and added that they had considered that the lease was to be surrendered at the day agreed upon. *Held*, that the award was void. *Ib.*

10. Acceptance by the parties gives no validity to an award on a submission under the Rev. Sts. *c.* 114, of matters which are not the subject of such a submission. *Ib.*

11. An award under the Rev. Sts. *c.* 114 must be returned within the time specified in the submission to a term or session of the court of common pleas, and not merely filed in the clerk's office; and an omission so to return it cannot be waived orally. *Burghardt* v. *Owen*, 300.

See EQUITY, 5, 6; PROMISSORY NOTE, 8.

ARREST.

Under the *St.* 1857, *c.* 141, § 17, no person can be arrested on mesne process, if the affidavit of the creditor "that he believes that the defendant has property not exempt from being taken on execution," omits to add "which he does not intend to apply to the payment of the plaintiff's claim," or to state not only that the creditor believes, but that he "has reason to believe, the defendant has property," &c. *Stone* v. *Carter*, 575.

See COLLECTOR OF TAXES, 6, 7; MANUFACTURING CORPORATION

ASSESSORS.

Assessors have no power to abate a tax after their term of office has expired *Inhabitants of Cheshire* v. *Howland*, 321.

ASSIGNMENT.

An assignment for the benefit of creditors, made by a citizen of another state, in that state, and valid by the laws of that state, holds property remaining in that state, as against a trustee process brought in this state by a citizen of that state against the assignee, who resides here. *Benedict* v. *Parmenter*, 88.

See PLEADING, 2; PLEDGE.

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ASSUMPSIT.

See MONEY HAD AND RECEIVED; TAX, 2

ATTACHMENT.

See EQUITY, 10; HUSBAND AND WIFE; INSOLVENT DEBTORS, 4; PRINCIPAL AND AGENT, 2.

ATTORNEY AND COUNSEL.

See EVIDENCE, 21, 22.

AUDITA QUERELA.

Audita querela may be maintained by a judgment debtor, residing out of the Commonwealth, and not served with process, to set aside an execution taken out by the creditor without first filing the bond required by the Rev. Sts. *c.* 92, § 6; even after the execution has been levied upon his real estate and returned satisfied. *Dingman* v. *Myers*, 1.

AUDITOR.

1. It is no ground of exception to the admission in evidence of an auditor's report at a trial before the jury, that the auditor appointed a time and place for the hearing, which were not convenient to the counsel of the party excepting, as the counsel of the other party knew. *Inhabitants of Cheshire* v. *Howland*, 321.
2. An auditor's report is *prima facie* evidence, but does not change the burden of proof. *Morgan* v. *Morse*, 150.
3. An instruction to the jury, that the burden of proof is upon the defendant to overturn or control an auditor's report in favor of the plaintiff, is no ground of exception, if it does not appear that the distinction between being *prima facie* evidence and changing the burden of proof was brought to the attention of the court. *Ib.*
4. The report of an auditor, to whom a suit in equity is referred without any special order or agreement as to the effect of his report, is *prima facie* evidence, but not conclusive. *Crafts* v. *Crafts*, 360.

See EXCEPTIONS, 3.

BAR.

See CONSTABLE, 3; MORTGAGE, 5; RELEASE.

BASTARDY PROCESS.

1. The "accusation and examination" of a complainant in a bastardy process, under the Rev. Sts. *c.* 49, § 1, may be reduced to writing by another person in the magistrate's absence before the examination. *Sayles* v. *Fanning*, 538.
2. A difference between the examination of a complainant under the bastardy act, by the magistrate, and her subsequent complaint to the court, in stating the time when the child was begotten, is not a fatal defect in the process. *Ib.*

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BILL OF EXCHANGE.

A foreign bill of exchange or promissory note, payable at sight, is entitled to grace, by the general law merchant, unless the contrary is shown to be the law of the place where it is to be paid; and must therefore be presented for payment. *Cribbs* v. *Adams*, 597.

See NOTARY PUBLIC.

BOND.

1. A bond, having indorsed upon it a parol agreement signed by both parties, varying its terms, and also a subsequent sealed agreement, executed by both parties, by which the time of performance is extended and "the foregoing bond is acknowledged to be in full force in every respect for the time here stated," is a sealed instrument, and an action thereon is not barred, by the statute of limitations, in six years. *Loring* v. *Whittemore*, 228.
2. A bond to the trustees of an unincorporated loan fund association, (the articles of which provide for the termination of the association so soon as its funds shall attain a certain amount,) for the payment of a certain sum monthly so long as the association shall exist, is not void for uncertainty. *Merrill* v. *McIntire*, 157.
3. After a verdict and judgment for the penal sum, in an action for breach of the condition of a bond, the defendant, upon a hearing to ascertain the amount due and payable in equity and good conscience, pursuant to the Rev. Sts. *c.* 100, § 9, may prove any payments on the bond, although not set up in his answer to the declaration. *Ib.*

See COLLECTOR OF TAXES, 3–5; CONSTABLE; DAMAGES, 1, 2; EVIDENCE, 6 MORTGAGE, 3, 4; REPLEVIN; USURY.

BOUNDARY.

See ARBITRAMENT AND AWARD, 1, 2, 5; DEED, 1–3; EVIDENCE, 9.

BRIDGE.

See ACTION, 3.

BUILDING.

See MECHANICS' LIEN, 1.

BURDEN OF PROOF.

See AUDITOR, 2, 4; EVIDENCE, 1–3; INSURANCE, 5; PAUPER, 4.

CARRIER.

1. The proprietors of a railroad, who negligently delay the transportation of goods delivered to them as common carriers, and then transport them safely to their destination, are not responsible for injuries to the goods by a flood while in their depot at that place, although the goods would not have been exposed to such injury but for the delay. *Denny* v. *New York Central Railroad*, 481.

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2. Parol evidence that a railroad corporation established by law in another state has held itself out, through its agents, as a common carrier over a railroad in this commonwealth, is sufficient *prima facie* evidence of its capacity to contract for such carriage, to maintain an action against it for the loss of merchandise entrusted to it. *McCluer* v. *Manchester & Lawrence Railroad*, 124

3. A railroad corporation which has leased a portion of another railroad connecting with its own is not exempted from liability to the owner of goods delivered to it at a depot on the portion so leased, by an agreement with the proprietors of that road, by which the two corporations upon their respective roads mutually agree to furnish suitable depot accommodations, and receive and deliver freights, and that the liability of the first corporation for upward freight upon the road of the second shall not commence until delivery on the cars of the first. *Ib.*

4. A railroad corporation cannot dispute their liability for freight delivered to them to be carried over a railroad leased to them, on the ground that the lease is void. *Ib.*

CASES OVERRULED, DOUBTED OR DENIED.

JONES *v.* STEVENS, 5 Met. 373.
ROWE *v.* SMITH, 16 Mass. 306.
STREET *v.* BLAY, 2 B. & Ad. 461.
Morgan v. *Morse*, 152.
Fuller v. *Shattuck*, 72.
Bryant v. *Isburgh*, 612.

CITY.

See TOWN; TRUSTEE PROCESS, 2.

CLERK OF COURTS.

1. An assistant clerk, appointed by the court under legislative authority, may sign, in the absence of the clerk, writs required by the Constitution to be signed by "the clerk of such court," although the Constitution now requires "clerks of courts" to be elected by the people. *Jacobs* v. *Measures*, 74.

2. The assistant clerk of the courts in Middlesex is authorized by the *St.* of 1851, *c.* 38, § 3, to sign precepts, although the clerk is acting as such in another town within the county. *Ib.*

CODICIL.

See CONDITION, 1.

COLLATERAL SECURITY.

See PLEDGE.

COLLECTOR OF TAXES.

1. A warrant to a collector of taxes, which directs him to collect the amount of a highway tax "in money or receipts from the surveyor of highways," is unauthorized by law *Inhabitants of Cheshire* v. *Howland*, 321.

2. A collector of taxes is not responsible to the town for not collecting taxes under a warrant illegal upon its face. *Ib.*

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3. Payments made by a collector of taxes in behalf of the town, and allowed to him by the town in account, cannot be again allowed him in an action by the town on his official bond. *Ib.*

4. In an action by a town on the bond of its collector of taxes, amounts paid by the collector on negotiable orders drawn by the selectmen upon him cannot be credited to the defendants. *Ib.*

5. In an action upon a collector's bond, interest is to be allowed upon the amount due from the time of a demand upon the collector. *Ib.*

6. The return of a collector of taxes upon his warrant is only *prima facie* evidence in his favor, in an action against him for an unlawful arrest. *Lothrop* v. *Ide*, 93.

7. A collector of taxes has no right, under the Rev. Sts. *c.* 8, § 11, to take the body for nonpayment of taxes, if sufficient property is shown to him upon which to levy; although fourteen days have elapsed since a demand of payment. *Ib.*

8. A tender of the amount due for taxes on land advertised for sale for nonpayment of taxes, but not yet sold, need not include any fees of the collector for a levy upon the land, or for travel to make a return to the state and county treasurers, or for a commission on the tax. *Converse* v. *Jennings*, 77.

CONDITION.

1. A devise upon condition that the devisee shall "comply with what is enjoined upon him in this will," is *prima facie* upon condition that the devisee shall comply with what may be enjoined upon him in any codicil to the will. *Tilden* v. *Tilden*, 103.

2. A condition, in a devise, to keep a house in good repair, is broken by omitting to rebuild the house within a reasonable time, if destroyed by fire. *Ib.*

3. A testator by his will gave to his wife an honorable maintenance for life, to be provided by his son; to one daughter, so long as she should remain unmarried, the improvement of half of his dwelling-house, and certain privileges, and a certain provision at the expense of his son; the residue of his estate to his son, "provided he shall in all respects comply with what is enjoined upon him in this will, and if he shall not thus comply," then to the testator's two daughters in equal shares; and constituted his son executor. By a codicil, the testator directed his son, his heirs and assigns, to keep in good repair all that part of the dwelling-house, the improvement of which had been given to the unmarried daughter; and charged his real estate with the support of said daughter in case the provision already made for her should prove inadequate. *Held*, that the testator's son took the estate upon condition that he should keep the house in repair; that, in case of the house being burned down, a failure to rebuild within a reasonable time was a breach of the condition; and that the fact, that the daughter had leased her part of the house to the son, and that a sublessee was in possession at the time of the fire, did not affect her right to have it repaired, nor extend the time within which that should be done. *Ib.*

4. J. S. devised the use and improvement of half of his dwelling-house to a

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daughter for life, and devised all his estate to his son upon condition that he should keep that half of the house in repair, and in case of his failure to comply with any provision of the will gave the estate to this daughter and another After breach of the condition, this daughter in writing requested the son "to repair the dwelling-house, the use and improvement of which were devised by J. S. to me," and notified him that she claimed that the estate devised to him was forfeited by his failure to comply with the provisions of the will, and that she claimed her share under the devise thereof in case of such failure. *Held*, that this was sufficient demand and notice, if any were necessary, before bringing a suit to recover her half of the estate, for breach of the condition. *Ib.*

CONFLICT OF LAWS.

See ASSIGNMENT; PLEDGE.

CONSIDERATION.

See CONTRACT, 1, 2; PROMISSORY NOTE, 1, 2.

CONSTABLE.

1. The provision of *St.* 1845, *c.* 70, § 2, that in actions on constables' bonds "the like proceedings shall be had as in a suit by a creditor on administration bonds," does not require the action to be brought in this court. *Inhabitants of Greenfield* v. *Wilson*, 384.
2. The attachment by a constable on mesne process of the property of one not the defendant is a breach of the condition of the constable's bond. *Ib.*
3. An unsatisfied judgment against a constable for the conversion of property wrongfully attached by him is no bar to an action upon his bond. *Ib.*

CONSTITUTIONAL LAW.

See CLERK OF COURTS, 1; CORPORATION, 1; SEARCH WARRANT.

CONTRACT.

1. A debtor, shortly before a debt became payable, wrote to the creditor, asking for an extension of twelve months, and received this reply: "I am satisfied with the determination you express to secure and pay your indebtedness at a stated time. But so small amount as mine I should feel willing to extend twelve months. If you have many creditors here, there ought to be a concert of action between you and them." *Held*, that this did not show an assent to the proposed extension. *Palmer* v. *Williams*, 338.
2. An agreement by the physician of a country village, transferring his practice and good will to another physician for a certain sum, and guaranteeing "that no other physician, for the space of four years, will establish himself in this place as a competitor, unless the increased population of the place should warrant it, or unless the purchaser should commit some act, which shall forfeit to him the confidence of the community," and agreeing, in case any such competitor shall establish himself there within that time, contrary to the above pro-

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visions, to repay the sum paid, is not void as being in restraint of trade, nor too uncertain and insensible to support an action. *Gilman* v. *Dwight*, 356.

3. The terms of an oral contract, when clearly proved, and intelligible and explicit, are to be construed by the court, and not by the jury. *Short* v. *Woodward*, 86.

See ACTION, 1; BOND, 1; CORPORATION, 1; DAMAGES, 1–5; LEASE; MILL, 4, 5; MORTGAGE, 5; PROMISSORY NOTE, 2; SALE.

CONVICT.

See SENTENCE.

CORPORATION.

1. The Essex Company, having made and maintained a fishway in their dam across the Merrimac River, to the satisfaction of the county commissioners, as required by their charter, (*St.* 1845, *c.* 163,) and having duly accepted the act of 1848, *c.* 295, authorizing them to increase their capital stock on condition that they should be liable for all damages occasioned by their dam to the owners of fish rights above it, and having paid large sums of money for such damages, cannot afterwards be required by the legislature, in the exercise of their power to regulate fisheries, to make different fishways; notwithstanding the Rev. Sts. *c.* 44, § 23, reserving to the legislature the right to amend, alter or repeal charters. *Commonwealth* v. *Essex Co.* 239.

2. The incorporation, pursuant to *St.* 1854, *c.* 454, of an unincorporated loan fund association, does not affect the right of its trustees to maintain an action on a bond previously given to them. *Merrill* v. *McIntire*, 157.

See MANUFACTURING CORPORATION; TAX, 1.

COSTS.

1. On the dismissal, on the plaintiff's motion, of an appeal of the defendant, the plaintiff is entitled to costs. *Moore* v. *Lyman*, 394.

2. In a suit in equity by an administrator to recover, for the benefit of creditors, the subject of a *donatio mortis causa*, the defendant, if he has not offered, in his answer, to pay the debts, but has denied that the suit can be maintained against him, will not be exonerated from the payment of costs and expenses of administration. *Chase* v. *Redding*, 418.

See ARBITRAMENT AND AWARD, 4; DAMAGES, 4; INSOLVENT DEBTORS, 4

COUNTY COMMISSIONERS.

1. A certificate of the number of votes given for county commissioner at a town meeting duly held for that purpose, and of the result thereby appearing, signed "Attest, J. S." without showing that it is a copy of the town record, or that J. S. is town clerk, is not a return which the board of examiners are authorized to receive, or will be required by mandamus to consider, in determining who is elected county commissioner. *Luce* v. *Mayhew*, 83.

2. By the Rev. Sts. *c.* 14, § 26, if the order of notice upon a petition to county

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commissioners for the repair of a highway is issued by a board of commissioners, one member of which resides in a town in which part of the highway lies, all subsequent proceedings are invalid, unless the irregularity is waived; and the presence, at the hearing upon the petition, of some citizens of a town, is no waiver of the irregularity on the part of that town. *Inhabitants of Tolland* v. *County Commissioners*, 12.

See JAILER.

COVENANT.

See WAY, 2.

DAMAGES.

1. In an agreement consisting of several stipulations, the damages for a breach of which cannot be well ascertained and valued, a certain sum, stipulated to be paid for a breach of any stipulation, is to be regarded as liquidated damages. *Chase* v. *Allen*, 42.
2. The owners and occupants of real estate in a certain part of a city subscribed $11,000 to aid A. in building a hotel there, and the agreement between A. and the subscribers was deposited with C., for the benefit of all parties; and A., upon receiving payment of the amount of this subscription, agreed, in case he should fail to build the hotel within a certain time, and in a certain manner, to refund the money with interest, and pay "full damages to the subscribers for their trouble and disappointment;" and afterwards, upon receiving notes of some of the same persons and of others for an additional like subscription of $9,000, gave a bond to C., conditioned, in case of failure to fulfil his agreement, to pay to C. on demand, for the benefit of the original subscribers, $11,000 with interest, to discharge the subscribers of the second agreement from all liability thereon, and to "further pay to C., for the benefit of all the subscribers, in proportion to the amount of their subscriptions, the additional sum of $20,000, not as a penalty, but as fixed and liquidated damages, and subject to no deduction." *Held*, that this sum of $20,000 was liquidated damages, and not a penalty; and that, upon A.'s breach of the agreement, C. might maintain an action against him for a portion thereof equal to the subscriptions of all those who had waived any rights under the first agreement, and had not settled and released their claims upon A. *Ib.*
3. The measure of damages for the breach of a contract to sell and deliver goods at a certain time is the value of the goods at that time, deducting the contract price; and no further damages can be recovered, if it does not appear that the use to which they were to be applied was known to the seller. *Bartlett* v. *Blanchard*, 429.
4. Evidence of the value, for a special case of goods sold, and detained by the purchaser, is inadmissible in an action for the price. *Bouton* v. *Reed*, 530.
5. *It seems*, that, in an action for breach of an agreement to withdraw another action, the costs of the defendant in that action, if paid by the plaintiff in this at any time before verdict, may be recovered. *Hagan* v. *Riley*, 515.

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6. In trover, the measure of damages is the value of the property at the time of the conversion; and if the jury are so instructed, a refusal to instruct them that the plaintiff is entitled to recover only the value at the time and place of conversion is no ground of exception. *Selkirk* v. *Cobb*, 313.

7. In an action of trover, the defendant concealed the chattel until a late stage of the trial, and contended that this created no presumption of its value against him, if he produced it at the trial. The court instructed the jury that the plaintiff ought not to be prejudiced by an intentional withholding of the chattel, calculated and intended to prevent him from showing its actual value as the measure of damages; and that they ought to give the full value, no more and no less. *Held*, that the defendant had no ground of exception. *Beecher* v. *Denniston*, 354.

See ACTION, 1; BOND, 3; CARRIER, 1; EVIDENCE, 19; MILL, 6–10; PLEADING, 5; PROMISSORY NOTE, 13; SALE, 2; WAY, 4–9.

DECLARATION.

See PLEADING, II.

DEED.

1. A conveyance of land, "bounded westerly by the beach," does not include the land between high and low water mark. *Niles* v. *Patch*, 254.

2. A boundary in a deed of land, "beginning at the northeast corner of land of J. S., and thence running southerly upon a brook to a creek, and thence running easterly across the said creek six poles to a stake," and by various courses and distances to the first mentioned bound, passes the land to the thread of the brook only. *Newhall* v. *Ireson*, 262.

3. A deed described the land conveyed as "laid out into building lots, and described on a plan, recorded," &c. "and numbered lots 12, 14, 16," &c., and as bounded "westerly by lot 10, or my own land by the middle of the brook between lots 10 and 12." The grantee on the same day made a mortgage back to the grantor of land bounded "westerly by the brook, and is the same land this day conveyed to me by said" grantor. The brook ran through lot 12 from north to south. *Held*, that the deed conveyed the land as far as the brook only. *Beahan* v. *Stapleton*, 427.

4. An heir's deed of his undivided share in certain land of his ancestor, "except the widow's right of dower," passes the reversion in the widow's third of the estate. *Canedy* v. *Marcy*, 373.

5. This clause, immediately following the description of land conveyed by deed, "A portion of the above described premises was set off on execution by A against B" on a certain day for a certain sum, "and this conveyance is made subject to the incumbrance of said execution," is an exception of the incumbrance of the execution, and not of the piece of land set off. *Shears* v. *Dusenbury*, 292.

6. A deed of land to a Roman Catholic Bishop, and his heirs and assigns forever, "in trust for the Catholic community, for the purpose of a free burial ground,'

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gives him an estate in fee; and he may maintain a writ of entry for the land against the *cestuis que trust*. *Fitzpatrick* v. *Fitzgerald*, 400.

See EQUITY, 2–5; EVIDENCE, 5; WAY, 2.

DEFAULT.

See JUDGMENT, 6; MANUFACTURING CORPORATION, 2; PLEADING, 4.

DEMAND.

An action for breach of an agreement to ship merchandise at a certain freight, by shipping it at a higher freight, may be maintained without a previous demand upon the defendant for an allowance of the excess of freight, or a demand for the merchandise. *Colburn* v. *Phillips*, 64.

See CONDITION, 4; PROMISSORY NOTE, 9, 10.

DEMURRER.

See APPEAL, 2; PLEADING, 5.

DEPOSITION.

The brother in law of one who as stakeholder is made a party to a suit in equity is not disqualified to take a deposition in the case as magistrate. *Culver* v. *Benedict*, 7.

DEVISE.

See CONDITION.

DIVORCE.

A decree of divorce *a vinculo*, between parties residing in this state, obtained in another state, for a cause which occurred here and which was not a legal cause of divorce here, and at the suit of a party who went into that state for the purpose of obtaining it, is void by the Rev. Sts. *c.* 76, § 39, and cannot be set up in defence to a libel for divorce filed by the same party in this state. *Smith* v. *Smith*, 209.

See EVIDENCE, 3; WITNESS, 1.

DOMICIL.

See PAUPER.

DRAIN.

See ACTION, 5.

EQUITY.

1 Relief in equity will not be granted against a judgment obtained at law upon a promissory note given solely for the purpose of testing, by a collusive action, whether the maker had any title in property held in trust for his wife. *Wells* v. *Smith*, 207.

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2. Under the *St.* of 1856, *c.* 38, this court has jurisdiction to reform a deed of real estate, upon clear oral evidence that it was not written according to the intention of the parties, although the scrivener used the words which he intended. *Canedy* v. *Marcy*, 373.

3. Lapse of time since the execution of a deed is no objection to having it reformed in equity according to the real intention of the parties making it, if that intention has been acted upon by both parties, and by those claiming under it, until within a year or two. *Ib.*

4. Under the *St.* of 1856, *c.* 38, this court has jurisdiction in equity to reform a deed made before its passage. *Ib.*

5. A bill in equity lies to compel the execution of a deed of land, ascertained, by an award of arbitrators agreed upon by the parties to settle the boundary line between their adjoining lands, to belong to the plaintiff. *Caldwell* v. *Dickinson*, 365.

6. The parties to a submission bound themselves to perform the award which certain arbitrators should "make and publish in writing under their hands," concerning a boundary line in dispute. The arbitrators executed a paper as an award, and read it to the parties, and signed and delivered copies thereof to them, with an oral statement of the actual decision, and that it was uncertain whether the award expressed it, and that, if it did not, it would be afterwards amended so as to conform to their intended decision, when the mistakes should be ascertained by an inquiry of the surveyor. The parties then separated, and the chairman of the arbitrators afterwards learned from the surveyor that the line which they had actually agreed on was not correctly stated in the award, and amended accordingly the award which he had retained; but the award was not again presented to the other arbitrators for signatures, nor republished *Held*, that equity would not enforce the specific performance, either of the amended or of the original award. *Ib.*

7. A count praying for relief in equity, under *St.* 1853, *c.* 371, cannot be joined with a count at law, without the affidavit required by *St.* 1840, *c.* 87, § 1, to give jurisdiction to this court. *Harvey* v. *De Witt*, 536.

8. An action at law, praying for relief in equity, under *St.* 1853, *c.* 371, to enforce the specific performance of a contract, is to be treated as a suit in equity. *Irvin* v. *Gregory*, 215.

9. A bill in equity, to enforce the specific performance of a written contract to convey land on the payment of the purchase money, may be maintained without a previous tender of the money or bringing it into court, if the plaintiff has offered the defendant a sum within a trifle of the amount due, which the defendant has refused to accept, and avers his readiness to pay whatever the court shall order. *Ib.*

10. Promissory notes given by one partner, still residing in this state, to his former copartner, now residing in another state, and placed by the latter in the hands of an agent here for collection, may be attached in equity, under *St.* 1851, *c.* 206, by a creditor of the firm. *Davis* v. *Werden*, 305.

11. Relief in equity may be had by A against B and C, for nonperformance of

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an agreement in writing, by which A, with B's consent, assigned to C all A's share in a partnership between A and B; B and C covenanted to assume the debts of that firm; and A and B agreed with C that such debts should not exceed a certain amount. *Scovill* v. *Kinsley*, 5.

12. In a suit in equity by an outgoing partner, for the nonperformance of an agreement by his copartner and a new member of the firm, to assume and pay the debts of the old firm to a certain amount, which the members of the old firm have agreed such debts shall not exceed, the plaintiff need not aver that the defendants have paid debts to that amount. *Ib.*

13. Three tenants in common of a hotel and the furniture therein signed a "proposed division" thereof, which set out, by metes and bounds, three parcels into which the real estate was to be divided, and specified the conditions as to occupancy, and the easements and appurtenances belonging to each parcel, and further provided that, "the division being completed, the parties agree, each with the other, to exchange title deeds with warranty, and to secure the payment of cash equivalents that may represent the differences in value of the several divisions;" appended to which were a schedule of the rents of the different parts of the estate for the two years next preceding, with these words, signed by the parties, "the only question to be determined by the appraisers is the true and relative value of each part after the division;" and a report of the appraisers. The parties also agreed orally that their several liabilities under the mortgage upon the estate should be so apportioned among themselves, that each should pay such proportion thereof as the appraised value of the lot to be conveyed to him should bear to the appraised value of the whole estate; and afterwards agreed that the first choice of lots should belong to him who would offer the highest sum for it; and he who offered the highest sum made a promissory note therefor to the other two, and selected a lot, and, with the consent of the others, took possession of it as the part which he was to have upon the division, made upon it the alterations which the conditions of the division required, leased it in his own name, and was afterwards recognized in various ways by the survivor of the two others, as entitled to hold and enjoy that parcel in severalty. But in the mean time, and before any agreement as to which of the others should take either of the remaining parcels, or arrangement for the division of their liability under the mortgage, or execution of any deeds of partition, one of the other two had died. *Held*, that the division had not been completed before his death, and could not now be completed according to the intention of the parties, and that equity therefore would not decree a conveyance of the lot, so selected, to him who had selected it. *Phelps* v. *Foot*, 423.

See AUDITOR, 4; COSTS, 2; INSOLVENT DEBTORS, 2, 8; MORTGAGE, 7, 8; PLEDGE.

ERROR.

See PLEADING, 4.

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EVIDENCE.

1. In an action to recover the price of intoxicating liquors, the burden of proof is upon the defendant to show that they were unlawfully sold. *Wilson* v. *Melvin*, 73.

2. The burden of proving a waiver of damages by one whose land has been taken for a highway is on the party alleging the waiver. *Brown* v. *City of Worcester*, 31.

3. The appointment by the court, under Rev. Sts. *c.* 76, § 18, of a guardian *ad litem* for a respondent to a libel, on the ground of insanity, is *prima facie* evidence of the respondent's insanity in any subsequent stage of the cause. *Little* v. *Little*, 264.

4. The originals of a writ of attachment and an execution, with the officer's returns thereon, are as good evidence as authenticated copies thereof. *Day* v. *Moore*, 522.

5. Proof that an instrument purporting to be under seal was signed by the person named therein is sufficient evidence of its execution to be submitted to the jury, although that person, having been called as a witness by the party seeking to prove the instrument, has testified that no seal was on the instrument when he signed it. *Brolley* v. *Lapham*, 294.

6. In an action on an arbitration bond, if the defendant, having the bond in suit in his possession, refuses to produce it on notice, the plaintiff may prove its contents by the counter bond in his own possession, and oral evidence. *Loring* v. *Whittemore*, 228.

7. An agreement in writing, by which a mortgagee agrees to deliver up the mortgage note to be cancelled, upon the doing of certain things by the mortgagor, "which settles all accounts with said mortgagor," may be shown by parol evidence to have been intended as a settlement of all claims for property taken from the premises by the mortgagee. *Hemenway* v. *Bassett*, 378.

8. On the trial of a writ of entry, under *St.* 1844, *c.* 107, against husband and wife, to assert the title of a creditor of the husband to property alleged to have been conveyed to the wife in fraud of his creditors, declarations of the husband, made after the conveyance, are inadmissible against the wife to prove such fraud. *Aldrich* v. *Earle*, 578.

9. The declarations of one occupying land under a bond for a deed are admissible in evidence of the boundaries of the land against a stranger, in favor of one who afterwards takes an assignment of the bond from such occupant, and a deed directly from the obligor. *Niles* v. *Patch*, 254.

10. In an action of trespass on land, evidence of declarations of a person, who formerly occupied it under a bond for a deed from the defendant, that he did not own the land in dispute, is inadmissible, if that person has not been called as a witness, and no evidence has been introduced that he ever did own the land. *Ib.*

11. In an action for breaking and entering a close, the title to which is disputed, a witness, who has testified that he was in the habit of going upon the premises, cannot be asked "what he used to go there for," for the purpose of showing

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that he and all the neighbors were in the habit of using the land as common property. *Ib.*

12. In an action of trespass on land, the testimony of a former occupant, that he had a controversy and suit at law with the defendant concerning the land, is admissible in evidence; and the admission of such testimony as to the settlement of that suit is no ground of exception by a party who did not specify, as his ground of objection, that the record of the suit would be better evidence. *Ib.*

13. In an action to recover the price of bricks of a certain kind, a building contract between the defendant and a third person, by which the latter agrees to take the bricks purchased by the defendant at the same prices as those now charged by the plaintiff to the defendant, is admissible in evidence, against the defendant, of the kind and price of the brick. *Morgan* v. *Morse*, 150.

14. In an action on a promissory note, in which the defence relied upon is that it was given for intoxicating liquors to be resold, as the plaintiff knew and aided in effecting, in violation of law, bills for intoxicating liquors previously sold by the plaintiff to the defendant, though not shown to be the liquors which were the consideration of the note in suit, are admissible in evidence to show the course of dealing between the parties, in connection with the plaintiff's knowledge that the defendant was a dealer in liquors. *Hubbell* v. *Flint*, 277.

15. In an action by a mother against two sons for money paid to their use, one of the defendants contended that the money was paid to the sole use of the other; and testified that he asked his mother to give him a note for the amount which he feared he should have to pay for his brother, and she offered to give him a mortgage of part of her farm. *Held*, that evidence of her having in former years paid money for him, and given him the use of the farm, was incompetent to contradict his testimony. *Farnum* v. *Farnum*, 508.

16. In an action of tort against a city for obstructing a stream by the erection of a bridge, to the injury of a mill, evidence that one of the then owners of the mill, at the hearing before the committee of the city council, objected to the construction of the bridge, as likely to obstruct the water, is inadmissible for the plaintiff; although the defendants have been allowed to show, upon cross-examination of the other owner, that he was one of that committee, and approved of the bridge. *Sprague* v. *City of Worcester*, 193.

17. In trover for a manufactured article, which the defendant has declined to exhibit on the trial, a witness who testifies that he is not acquainted with the market value of the article, but that he could form an opinion of the workmanship if he could see it, may be asked by the plaintiff his opinion of the value of the article, as described by other witnesses. *Beecher* v. *Denniston*, 354.

18. A witness who had been for many years a photographer, and previously "a teacher of the branches usually taught in select schools," including handwriting, was permitted to state his opinion whether certain words on a paper shown him were written before or after the paper was folded. *Held*, that the admission of this evidence was no ground of exception. *Bacon* v. *Williams*, 525.

19. On the hearing before a sheriff's jury, of a petition for damages for land

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taken for a highway, evidence that a witness, not shown to be an expert "offered the petitioners one dollar a foot for a portion of the land in question, is incompetent. *Dickenson* v. *Inhabitants of Fitchburg*, 546.

20. A special county commissioner, who as such has assessed damages in other cases for land taken for highways, is competent to give his opinion of the effect of taking for a highway part of certain land which he has often seen. *Ib.*

21. In an action by an officer on an agreement to indemnify him for making an attachment, the facts, that the defendant directed his attorney to make the attachment, and that upon being asked for a bond of indemnity, he consulted his attorney, and was told by him that if he directed the attachment to be made, or agreed to indemnify the officer, he would be liable, whether he signed the bond or not, are not inadmissible as privileged communications with counsel. *Day* v. *Moore*, 522.

22. A third person who overhears a confidential communication between an attorney and his client may testify of it. *Hoy* v. *Morris*, 519.

See APPEAL, 4; ARBITRAMENT AND AWARD, 5; AUDITOR; BASTARDY PROCESS, 2; CARRIER, 2; COLLECTOR OF TAXES, 6; DAMAGES, 7; DEED, 3; DEPOSITION; EQUITY, 2; EXCEPTIONS, 2–6; EXECUTOR, 1; GUARANTY; INSOLVENT DEBTORS, 10; INSURANCE, 5, 7; JUDGMENT; MALICIOUS PROSECUTION, 2; MANUFACTURING CORPORATION, 4; MILL, 7; MORTGAGE, 1, 4, 9, 10; NUISANCE, 3; PARTNERSHIP, 3, 4; PAUPER, 4; PLEADING, 9, 10; PROMISSORY NOTE, 3–8, 12; VARIANCE; WITNESS

EXAMINERS.

See COUNTY COMMISSIONERS, 2.

EXCEPTION.

See DEED, 4, 5.

EXCEPTIONS.

1. An agreement under *St.* 1857, *c.* 267, waiving a trial by jury, submits the facts to the determination of the presiding judge. *Loring* v. *Whittemore*, 228.

2. The admission of evidence in reply, which should have been introduced in chief, is within the discretion of the presiding judge, and not subject to exception. *Day* v. *Moore*, 522.

3. A ruling that the plaintiff has a right to the first instance to rely upon an auditor's report in his favor, and, if the defendant should offer evidence tending to control that report, then the plaintiff, as a matter of right, might give evidence in support of his case, is no ground for setting aside the verdict. *Morgan* v. *Morse*, 150.

4. The striking out by the presiding judge, after the commencement of the arguments to the jury, of incompetent evidence which has been admitted without objection, is no ground of exception. *Selkirk* v. *Cobb*, 313.

5. The rejection of a plan, offered in evidence after all the testimony on both

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sides is closed, is within the discretion of the presiding judge, and not subject to exception. *Bacon* v. *Williams*, 525.

6 An exception to the admission of incompetent evidence is not cured by an instruction to the jury that it is immaterial. *Farnum* v. *Farnum*, 508.

See ACTION, 7; AUDITOR, 3; EVIDENCE, 12; JAILER, 4; PROMISSORY NOTE, 5; WITNESS, 11.

EXECUTION.

See AUDITA QUERELA; MANUFACTURING CORPORATION.

EXECUTOR AND ADMINISTRATOR.

1. The fact that an administrator gave public notice of his appointment may be proved by oral evidence, as well as by an affidavit of the administrator filed and recorded pursuant to the Rev. Sts. *c.* 66, § 2, and *St.* 1855, *c.* 132. *Henry* v. *Estey*, 336.

2. The occupation of real estate of an intestate by one of his two administrators, who is also one of his heirs, without paying or charging himself with any rent, is not of itself a bar to granting a petition for leave to sell real estate for the payment of debts. *Palmer* v. *Palmer*, 326.

3. The lapse of four years is no bar to granting the petition of an administrator for leave to sell real estate of his intestate for payment of a debt to the administrator, if the administrator has been guilty of no laches. *Ib.*

4. The fact that an administrator's account is still unsettled is no bar to his petition for leave to sell real estate of his intestate for payment of debts. *Ib.*

5. The wife of a devisee of real estate is not entitled to notice of a petition of the devisor's administrator for license to sell it for the payment of debts, legacies and charges of administration. *Harrington* v. *Harrington*, 513.

6. Manure taken from the barnyard of a homestead, and piled upon the land, though not broken up nor rotten, nor in a fit state for incorporation with the soil, is part of the realty, and does not go to the administrator of the owner. *Fay* v. *Muzzey*, 53.

7. An administrator must be charged with the value of manure which is personal property, although he has spread it in the usual course of good husbandry upon the land of the deceased, and has sold the land for the payment of debts. *Ib.*

8. An administrator must account for chattels included in his inventory to an administrator *de bonis non*, although they are also included in the inventory of the latter. *Ib.*

9. An administrator of an insolvent estate must account to an administrator *de bonis non* for sums of money paid on debts of the intestate by the first administrator during the first year of his administration, though without knowledge that the estate was insolvent. *Cobb* v. *Muzzey*, 57.

10. An administrator is responsible for personal property applied by him to repairs and improvements of the real estate, though so applied in executing an agreement of his intestate. *Ib.*

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11. An administrator, who has admitted claims made against the estate of his intestate before they were barred by the special statute of limitations, and agreed with such creditors to bring a suit for their benefit to recover back a gift *causa mortis* of the intestate, may bring such suit after the expiration of such period of limitation. *Chase* v. *Redding*, 418.

See APPEAL, 1; GUARDIAN, 3, 4; LIMITATIONS, 5, 6.

FEES.

See COLLECTOR OF TAXES, 8; JAILER, 1.

FISHERY.

See CORPORATION, 1.

FIXTURES.

See EXECUTOR, 6, 7; MILL, 8, 9; RELEASE.

FORCIBLE ENTRY AND DETAINER.

See ABATEMENT.

FOREIGN ATTACHMENT.

See TRUSTEE PROCESS.

FRAUDS, STATUTE OF.

1. An agreement to take a certain annual compensation for damages occasioned by flowing land by a milldam is not an agreement for the sale of an interest in lands, within the statute of frauds. *Short* v. *Woodward*, 86.

2. If two persons come together to an attorney to engage his services in defence of one of them on a criminal prosecution, *prima facie* that one is alone primarily responsible, and the liability of the other is within the statute of frauds, unless there was an original express promise on his part to pay for the services *Stone* v. *Walker*, 613.

3. Under the Rev. Sts. *c.* 74, § 3, as under the *St.* of 1834, *c.* 182, § 5, representations concerning the dealings or trade of a third person need not be in writing, unless made with the intent that such person may obtain credit, money or goods therefor. *Norton* v. *Huxley*, 285.

See MONEY HAD AND RECEIVED; PLEADING, 3.

FRAUDULENT CONVEYANCE.

See EVIDENCE, 3; TRUSTEE PROCESS, 1.

FREIGHT.

See DEMAND.

GIFT.

1. A gift of negotiable promissory notes, secured by mortgages of real estate, with

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proper assignments of the mortgages to the donee, made during the last illness of the donor, who is aware of his condition, and intends the gift as a final disposition of the property, is a good *donatio mortis causa*. *Chase* v. *Redding*, 418.

2. A *donatio mortis causa* will not affect the rights of creditors of the donor. *Ib*

See EXECUTOR, 11; COSTS, 2.

GOODS SOLD.

See DAMAGES, 3, 4; SALE, 2.

GRACE.

See BILL OF EXCHANGE, 1.

GUARANTY.

1. The description of a promissory note, in a sealed guaranty, as annexed thereto, and the omission to mention in the guaranty that the note is attested, and bears indorsements of payments of interest, will not exempt the guarantor from the payment of a note corresponding in all other particulars with the description in the guaranty. *Worcester County Institution for Savings* v. *Davis*, 531.

2. A guaranty of a promissory note, expressly "waiving all right to demand and notice," cannot be contradicted by oral evidence of a contemporaneous agreement to collect the note from the principal debtor, and of laches in pursuing him. *Ib.*

See PROMISSORY NOTE, 5.

GUARDIAN AND WARD.

1. A guardian, licensed to sell real estate of his ward for the purpose of investment, did not duly invest the proceeds, but charged himself with such proceeds and with interest thereon from year to year in his general guardianship account, which was allowed by the court of probate, and expended sums equal to such interest for the support of his ward. *Held*, that he was responsible for such proceeds upon the special bond given by him on obtaining the license; but for the interest thereon, upon his general bond. *Mattoon* v. *Cowing*, 387.

2. A guardian is responsible on his general bond, for money due from him to his ward at the time of his appointment, and for the rent of real estate occupied by the guardian before that time. *Ib.*

3. A guardian, who was also executor of a will in which his ward was residuary legatee, paid out for the support of his ward, as appeared by his guardianship account as allowed, more than he received as guardian. *Held*, that the excess should have been credited to him in his executor's account as paid over to himself as guardian, and charged to him in his guardianship account; and that if not so done in form, it should be deducted from the liability of himself and his sureties on his bond as executor. *Ib.*

4. The sureties on a guardian's bond are not discharged from liability by the fact that the guardian's account is not settled until more than two years after his

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death, and after the right of action against his administrator is barred by the statute of limitations. *Chapin* v. *Livermore*, 561.

See LIMITATIONS, 6.

HANDWRITING.

See EVIDENCE, 18; WITNESS, 7.

HIGHWAY.

See WAY.

HOMESTEAD.

1. The proviso in the homestead act of 1857, *c.* 298, § 18, that the repeal of the *Sts.* of 1855, *c.* 238, and *St.* 1851, *c.* 340, "shall not affect any rights acquired under said acts," protects rights of homestead exemption conferred by the *St.* of 1855, *c.* 298, without their being recorded as required by *St.* 1857, *c.* 298, § 3. *Clark* v. *Potter*, 21.
2. An insolvent debtor, entitled to a homestead under the *St.* of 1855, *c.* 238, and owing debts contracted before the passage of that act to an amount of less than $800, is entitled to have set off to him a homestead of the value of $800, deducting the amount of such debts. *Ib.*
3. A mortgage of a homestead exempted from levy on execution by *St.* 1855, *c.* 238, except for debts contracted before the passage of that act, if made with intent to give a preference contrary to the insolvent laws, is void as against the mortgagor's assignee in insolvency. *Beals* v. *Clark*, 18.

HUSBAND AND WIFE.

Under the *St.* of 1857, *c.* 249, a note made payable to a married woman is exempt from attachment by subsequent creditors of her husband. *Chapman* v. *Williams*, 416.

See EQUITY, 1; EVIDENCE, 8.

INDICTMENT.

After conviction on an indictment containing several counts for the same offence, only one of which is sufficient, judgment may be rendered on that count. *Commonwealth* v. *Howe*, 26.

See NUISANCE, 2–4.

INSANE PERSON.

See EVIDENCE, 3; JUDGMENT, 4; PAUPER, 3; WITNESS, 1.

INSOLVENT DEBTORS.

1. The provision of the *St.* of 1856, *c.* 284, § 5, that if any judge of insolvency "shall, from sickness, absence or other cause, be unable to perform the duties required of him in any case arising within his jurisdiction," such duties should be performed by the judge of the adjoining county, therein specified, does not

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extend to the case of a vacancy in the office of judge of insolvency in the county where the case is pending. *Grafton Bank* v. *Bickford*, 564.

2. Proceedings in insolvency, commenced before a judge who has no jurisdiction, will be set aside on a bill in equity, filed under *St.* 1838, *c.* 163, § 18, more than a year after. *Ib.*

3. A promise by a new partnership to an outgoing partner, to pay the debts of the old firm, creates no debt which he, upon their taking the benefit of the insolvent laws, and his being therefore obliged to pay one of those debts, can prove against their estate, under the *St.* of 1838, *c.* 163, § 3. *Morton* v. *Richards*, 15.

4. Where an attachment of the property of one partner by a creditor of the partnership is dissolved by the assignment of the estate of that partner under the insolvent laws, the creditor, upon proving his debt and the costs of his suit against his estate, is entitled to be paid such costs, before the payment of the partner's individual debts. *Buck* v. *Burlingame*, 307.

5. The assignee of the estates of both partners under distinct proceedings in insolvency must administer the estate of the partnership. *Harmon* v. *Clark*, 114.

6. Partnership property, mortgaged by the partners to secure a joint and several note signed by them individually for money which was applied to the separate use of one partner, was appropriated by the assignees of the partnership to the payment of that note. *Held*, that the estates of the partnership were not entitled, in insolvency, to any contribution from the estate of that partner. *Ib*

7. Partnership property, conveyed, upon a dissolution of the partnership, to one of the partners, who agrees to hold and convey one half of it to his copartner after paying the debts of the firm, is to be applied, in case of the insolvency of both partners, to the payment of the partnership debts. *Ib.*

8. Property mortgaged to secure notes indorsed by the mortgagee for the accommodation of the mortgagor will be applied in equity, upon the insolvency of both maker and indorser, to the payment of such notes. *Rice* v. *Dewey*, 47.

9. Under the *St.* of 1844, *c.* 178, § 5, as under the previous insolvent laws, a certificate of discharge, obtained upon second proceedings in insolvency, is no bar to an action upon a debt which might have been proved under the first proceedings, and was not proved under the second proceedings. *Whitney* v. *Willard*, 203.

10. The intent to prefer a creditor in violation of the insolvent laws may be inferred from the fact of preference. *Beals* v. *Clark*, 18.

See ASSIGNMENT; CONTRACT, 1; HOMESTEAD, 2, 3; LIEN; LIMITATIONS, 2–4; MORTGAGE, 11; PARTNERSHIP, 1; SEARCH WARRANT; SET-OFF.

INSOLVENT ESTATE.

See EXECUTOR, 9.

INSURANCE.

I. *Fire Insurance.*

1. A policy of insurance was declared upon its face to be "made and accepted

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in reference to the survey on file at this office;" and was afterwards renewed "upon condition that the application, upon which said policy was originally predicated, shall continue valid and in full force." The policy had been issued upon an application for insurance headed with the name of another insurance company, and signed by the president of that company, who delivered the application to this company, and procured the original policy and the renewal of it; but there was no other evidence that the application was made with the authority or knowledge of the assured. *Held*, that the assured was not bound by the statements in the application, as to the precautions to be taken against fire; nor by representations made by such president, at the time of procuring the renewal, as to the amount of other insurance. *Denny* v. *Conway Stock & Mutual Fire Ins. Co.* 492.

2. An application for insurance, in which the applicant agrees that it is "a correct description of the property, so far as regards the condition, situation, value and risk on the same," and that "the misrepresentation or suppression of material facts shall destroy his claim for damage or loss," is not a warranty of the truth of the answers to interrogatories in it, except so far as they are material to the risk; although the by-laws, to which the insurance is expressly made subject, provide that the application shall be held to be a part of the policy and "a warranty on the part of the assured," and that "unless the applicant shall make a correct description and statement of all facts inquired for in the application, and also all other facts material in reference to the insurance, or to the risk, the policy shall be void." And the materiality of any answer is to be determined by the jury. *Elliott* v. *Hamilton Mutual Ins. Co.* 139.

3. An application for insurance on a stock of goods represented that it was "all of goods usually kept in a country store," and that there was no "cotton, or woollen waste or rags kept in or near the property to be insured." The by-laws, to which the insurance was expressly made subject, provided that no building in which cotton or woollen waste or oily rags were allowed to remain at night should be insured; and that all cotton, woollen, hempen or oily waste, or rags, should be destroyed or removed every evening. *Held*, that the keeping of clean white cotton rags, if usually forming part of the stock of "a country store," did not avoid the policy. *Ib.*

4. A mere agreement between the owner of property insured and another person to represent to the creditors of the owner, in order to prevent attachments, that it had been sold to such other person, does not avoid the policy, although the policy is upon condition that the insurance shall be void "in case of any sale, transfer or change of title." *Orrell* v. *Hampden Fire Ins. Co.* 431.

5. In an action upon a policy of insurance, upon property which is admitted to have been owned by the plaintiff when the policy was issued, the burden of proof is upon the defendants to show a subsequent alienation of the property. *Ib.*

See ACTION, 6; MUTUAL INSURANCE COMPANY; PLEADING, 2; PRINCIPAL AND AGENT, 1.

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II. *Life Insurance.*

8. A person whose life is insured by a policy which permits him to pass by sea between certain ports "on first class decked vessels," does not forfeit the policy by going as steerage passenger in such a vessel. *Taylor* v. *Ætna Life Ins. Co.* 434.

7. Under a policy of life insurance, payable in a certain time "after due notice and proof of the death," a physician's certificate of the death is not an essential part of the proof, unless expressly required by the policy, or by a usage of the company made known to the plaintiff before he took the policy. *Ib.*

INTEREST.

See COLLECTOR OF TAXES, 5.

INTOXICATING LIQUORS.

See EVIDENCE, 1, 14; NUISANCE; PLEADING, 10; PROMISSORY NOTE, 4, WITNESS, 2.

JAILER.

1. The fee of "twenty cents for each and every prisoner committed or discharged," to which a jailer is entitled under *St.* 1836, *c.* 277, is not to be included in the allowance to the jailer of "a reasonable sum for his services, and for the support of the prisoners under his charge, and other necessary expenses," to be made by the county commissioners, subject to the revision of the court of common pleas, under *St.* 1846, *c.* 11, § 3. *Adams* v. *County of Hampden*, 439.

2. The remedy of a jailer for the support of infant children of prisoners is against the town in which the prison is situated, and not by application to the county commissioners for an allowance under *St.* 1846, *c.* 11, § 1. *Ib.*

3. The keeping of a prison book, as required by *St.* 1848, *c.* 276, § 2, is not a condition precedent to an allowance by the county commissioners of additional compensation beyond the sum fixed by § 1 as the price of board. *Ib.*

4. The amount of additional compensation to be allowed to a jailer, beyond the price of board of prisoners, under *St.* 1848, *c.* 276, § 1, upon an appeal from the county commissioners to the court of common pleas, under *St.* 1846, *c.* 11, § 1, is within the discretion of that court, and not subject to revision on exceptions. *Ib.*

JUDGE OF INSOLVENCY.

See INSOLVENT DEBTORS, 1, 2.

JUDGMENT.

1. A judgment for the plaintiff in a writ of entry to foreclose a mortgage is conclusive in his favor against any title acquired by a defendant in that suit before it was commenced. *Shears* v. *Dusenbury*, 292.

2. One who has been adjudged trustee in foreign attachment, and paid over, on the execution issued on such judgment, all the funds in his hands, cannot be

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charged for such funds in a subsequent suit, if the officer's return states that the principal defendant had no place of abode within this state, and the record shows such order of notice as would be proper if that were the fact. *Wheeler* v. *Aldrich*, 51.

3. A decree of a probate court of another state, admitting to probate a will within its jurisdiction, is conclusive evidence, if duly authenticated, of the validity of the will, upon an application to prove it in this state; even when no notice of the offer of the will for probate was given, if by the law of that state no such notice was required. *Crippen* v. *Dexter*, 330.

4. In an action by the treasurer of the State Lunatic Hospital against a town, to recover the expenses of the support of a lunatic pauper, a general verdict and judgment for the defendant in a similar action between the same parties, to which the defendant answered, among other defences, that the pauper had no settlement within the Commonwealth, is conclusive evidence that the pauper had no such settlement during the period of furnishing the supplies sued for in the former action, if that question was submitted to the jury in that case. *Jennison* v. *Inhabitants of West Springfield*, 544.

5. A verdict and judgment for the defendant, in an action of contract upon a promise of the defendant to accept an order drawn upon him in favor of the plaintiff by one who had assigned to the plaintiff an unfinished contract of work for the defendant, are no bar to an action of tort by the plaintiff against the defendant, for inducing the plaintiff to take such assignment by false and fraudulent representations as to the amount remaining due from the defendant to the former contractor. *Norton* v. *Huxley*, 285.

6. In an action brought before a justice of the peace on a promissory note given for the price of a horse, the defendant relied on a breach of warranty, and judgment was given for a portion of the note, from which the plaintiff appealed to the court of common pleas, and the defendant was there defaulted. *Held*, that the former judgment was no bar to an action on the warranty. *Bodurtha* v. *Phelon*, 413.

7. In an action in this state on a judgment of the court of another of the United States, a return of the officer in that action, that he made personal service on the defendant in that state, may be contradicted by parol evidence. *Carleton* v. *Bickford*, 591.

See ACTION, 2; ARBITRAMENT AND AWARD, 5; CONSTABLE, 3; DIVORCE, EQUITY, 1; MONEY HAD AND RECEIVED, 2; PROMISSORY NOTE, 13; SENTENCE.

JURISDICTION.

See ARBITRAMENT AND AWARD, 6–9; EQUITY, 2, 4, 7, 10; INSOLVENT DEBTORS, 1, 2.

JURY.

See CONTRACT, 3; INSURANCE, 2; MALICIOUS PROSECUTION, 1; WAY, 4.

JUSTICE OF THE PEACE.

See DEPOSITION; MALICIOUS PROSECUTION, 2.

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LANDLORD AND TENANT.

See ARBITRAMENT AND AWARD, 8; CONDITION, 3; LEASE.

LAW AND FACT.

See CONTRACT, 3; MALICIOUS PROSECUTION, 1.

LEASE.

1. An indenture, by which W. leases and devises "a mill to C. for a term of ten years, yielding and paying rent therefor" a certain sum quarterly, to commence two months after this date; and C., "desiring that additions may be made to said mill, proposes to advance the capital necessary for said additions, said advance to be deducted from the rent," and "said C., lessee, agrees to pay an additional rent" for the additions, "of ten per cent. yearly on their cost," and "proposing to hire water power in connection with said mill, hereby covenants and agrees to pay W." a certain rent semiannually for the water power; and that he will pay the taxes, and not suffer waste, nor "assign the said lease or underlet, without the consent of the lessor;" and "at the termination of this lease, said C. is to have the right of renewing said lease for five years," is a lease, and not an agreement for a lease. *Weed* v. *Crocker*, 219.

2. Under a provision in a lease, that the lessor shall erect certain additional buildings, for which the lessee agrees to pay an additional rent "of ten per cent. yearly on their cost," no rent is due until notice to the lessee of the cost of the additional buildings. *Ib.*

3. In a lease of a paper mill, the lessee covenanted to pay rent for certain water power to be furnished by the lessor, and to put in at his own expense all machinery "except the main shaft and wheel, which is to be furnished by the lessor." *Held*, that the rent was not due until the lessor had furnished the main shaft and wheel. *Ib.*

See CARRIER, 4; CONDITION, 3; WAY, 9.

LICENSE TO SELL REAL ESTATE.

See EXECUTOR, 2–5; GUARDIAN, 1.

LIEN.

The owner of land, who sells wood standing thereon, with authority to the vendee to cut it within a certain time, has no lien on the wood for the price, in case of the vendee's insolvency after the wood is cut, and before it is removed *Douglas* v. *Shumway*, 498.

See MECHANIC'S LIEN; SHIP.

LIFE INSURANCE.

See INSURANCE, II.

LIMITATIONS, STATUTE OF.

1. The statute of limitations is no bar to an action on a debt contracted forty

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years ago in another state, without proof that the defendant has ever been in this commonwealth. *Putnam* v. *Dike*, 535.

2. The insertion of a debt in the schedule of creditors, filed and sworn to by a debtor under proceedings in insolvency, is not such an acknowledgment as will take the debt out of the statute of limitations. *Richardson* v. *Thomas*, 381.

3. The payment of a dividend by an assignee under the insolvent laws will not take the residue of the debt out of the statute of limitations as against the debtor. *Ib.*

4. The pendency of proceedings in insolvency does not suspend the operation of the statute of limitations in favor of the debtor. *Ib.*

5. The provision of the *St.* of 1855, *c.* 283, that the *St.* of 1852, *c.* 294, (which shortened from four to two years the period of limitation of actions by creditors against their debtor's executor or administrator,) shall not apply "to any right of action of any creditor of the estate of a deceased person against the executor or administrator of such person, which had accrued or existed against such deceased person, his executor or administrator, prior to the passage of said act," applies to a right of action against an executor or administrator who gave bond within two years before the passage of the act of 1855, and which existed against his testator or intestate prior to the passage of the act of 1852. *Thompson* v. *Burnham*, 211.

6. An action on a decree of the probate court for the payment of a balance due from the estate of a deceased guardian to his ward, is barred by *St.* 1852, *c.* 290, in two years from the appointment of the guardian's administrator, although the decree was not obtained until the two years had expired. *Bemis* v. *Bemis*, 559.

See BOND, 1; EXECUTOR, 11; GUARDIAN, 4.

LOAN FUND ASSOCIATION.

A voluntary loan fund association, established before the passage of the *St.* of 1854, *c.* 454, is lawful. *Baxter* v. *McIntire*, 168.

See BOND, 2; CORPORATION, 2; MORTGAGE, 2, 3; USURY.

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, when the facts are not controverted, the question whether they constitute probable cause for the prosecution is for the court. *Cloon* v. *Gerry*, 201.

2. A conviction by a justice of the peace, in a case within his jurisdiction, is sufficient evidence of probable cause, to defeat an action for malicious prosecution. *Ib.*

MANDAMUS.

See COUNTY COMMISSIONERS, 1.

MANUFACTURING CORPORATION.

1 In defence of an action against a sheriff by a stockholder of a manufacturing corporation, for arresting him on an execution against the corporation, it may be shown that he was a stockholder, although the return on the execution

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states that he was arrested as "now or formerly an officer of the within named corporation." *Richmond* v. *Willis*, 182

2. A person duly summoned under *St.* 1851, *c.* 315, as a stockholder, in an action against a manufacturing corporation, and defaulted, cannot afterwards deny the existence of the corporation, or his liability to be arrested as a stockholder upon the execution against the corporation. *Ib.*

3. An execution against a manufacturing corporation, which merely contains a command to take their property, authorizes the officer to take the body of a stockholder who was duly summoned in the action. *Ib.*

4. In an action against a sheriff for arresting a stockholder on an execution against a manufacturing corporation, the defendant may give in evidence his instructions from the judgment creditor. *Ib.*

MANURE.

See EXECUTOR AND ADMINISTRATOR, 6, 7; MILL, 9.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MECHANIC'S LIEN.

1. A wall, built around three sides of the stack of an iron furnace, at the distance of a few feet from it, in order to protect it from the possible sliding down of earth from a hill at the foot of which it stands, is not a building, within the meaning of the *St.* of 1851, *c.* 343; and including labor performed upon the wall, in a statement filed in the town clerk's office under that statute, will defeat any lien for work done upon the furnace. *Truesdell* v. *Gay*, 311.

2. The proprietors of a church made a contract in writing with a master builder to rebuild the church for a gross sum, "the contractor to perform all labor and to furnish all the materials." *Held*, that workmen employed by the contractor to work upon the building, or at the contractor's shop for the building, were entitled to a lien upon the building, under *St.* 1855, *c.* 431. *Dewing* v. *Wilbraham Congregational Society*, 414.

3. Other workmen, summoned in pending a petition to enforce a mechanic's lien, have the same rights as if they had filed separate petitions at the same time as this one. *Ib.*

4. A certificate filed in the town clerk's office, under *St.* 1855, *c.* 431, §§ 2, 3, claiming a lien for the entire amount agreed to be paid for the performance of a contract to do certain labor and furnish certain materials in the erection of a building, and stating that the mechanic has not completed the work, by reason of proceedings in insolvency against the owner of the land, and not stating the proportion due for the labor actually performed and materials actually used, is insufficient to support a lien on the building and land under that statute. *Lewin* v. *Whittenton Mills*, 100.

MILL.

1. The owners of a mill, who interrupt the flow of the water of the stream on

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which it is built, no more than is necessary for their own reasonable and proper use of the water, consistently with the common interest of all riparian proprietors on the same stream, are not liable to an action by the owner of a mill below, for not regarding, in their use of the water, his peculiar necessities, arising from the size and character of his pond and the nature of his work, although his mill had been established, and such work carried on there, for eighty years before the building of their mill. *Gould* v. *Boston Duck Company*, 442.

2. In estimating what is a reasonable use of water power by a millowner, usage, and the state of mechanical and manufacturing advancement, are to be considered. *Ib.*

3. An action against the owners of a mill by the owner of a lower mill on the same stream cannot be maintained on the following facts: The defendants' mill was adapted and appropriated to the size, capacity and water of the stream, and caused no further disturbance or interruption of the flow of the water to the plaintiff's mill than was necessary and unavoidable in its reasonable use for the defendants' mill, "but without reference to the plaintiff's necessities or demand for water in such periods of extraordinary drought as occasionally occur on this stream, when the water, though sufficient to operate the plaintiff's mill, would be insufficient to operate the defendants'; and without reference to any prescriptive or prior right of the plaintiff as the occupant of the older privilege." In seasons of drought, the defendants were obliged, in order to create the requisite head and supply of water for their mill, to shut their gates occasionally during working hours, and thus interrupted the flow of the water to the plaintiff's mill; "but this was not done wantonly, but with a reasonable regard to the best interest and advantage of the defendants as proprietors of their mill, and in conformity with the general usage of millowners running mills on this and other similar streams;" nevertheless, "in so doing, the defendants acted wholly irrespective of the plaintiff's interests, and of his necessities or demands for water, and neither acknowledged nor conformed, wholly or in part, to any claim made by the plaintiff that a sufficient quantity should be left flowing to operate the plaintiff's mill." *Ib.*

4 The owner of a mill, under an agreement authorizing him to "keep his dam to the jury mark, and no higher," may vary, repair or use his dam as he pleases, if he raises no part of the dam higher than that mark. *Short* v *Woodward*, 86.

5. An agreement to take a certain annual compensation for the flowing of land by a milldam, "if the owner of the mill would keep his dam to the jury mark, and no higher," cannot be considered as terminated by such owner's raising the water and the dam, by the addition of flashboards, above the mark for two seasons, if the owner of the land flowed gives receipts in full for his damages at the rate agreed upon during those years and afterwards, without giving any notice that he considers the agreement terminated. *Ib.*

6 The benefit occasioned to a meadow below a milldam, by a ditch dug at the time of the erection of the dam by the owner of the dam through his own land

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below the meadow, cannot be set off against the damages done to the meadow by subsequent flowing occasioned by the dam; and the cost of the ditch is immaterial in assessing such damages. *Gile* v. *Stevens*, 146.

7. On the trial of a complaint under the mill act, evidence that the withholding of water in the spring from other lands, situated like the complainant's, was a benefit greater than the injury occasioned by letting down the water in the dry season, is inadmissible, unless it appears that the water was withheld from the complainant's land in the spring, as well as suffered to flow upon it in the dry season. *Ib.*

8. Peat, dry or in process of curing upon a meadow, is personal property, and damages occasioned to it by the flowing of the meadow, cannot be recovered by complaint under the mill act. *Ib.*

9. Damages for the loss of manure placed upon a meadow for the purpose of cultivating it cannot be recovered, as a special item of damage, by complaint under the mill act. *Ib.*

10. Damages caused by flowing land below a milldam, unless caused by wrongful overflowing of the land, may be recovered by complaint under the Rev. Sts. *c.* 116. *Ib.*

See FRAUDS, STATUTE OF, 1.

MISTAKE.

See ACTION, 2; EQUITY, 2–4.

MONEY HAD AND RECEIVED.

1. Money paid on an oral agreement for the purchase of land cannot be recovered back if the party who received it is ready and able to perform the contract on his part. *Congdon* v. *Perry*, 3.

2. A debtor who has paid money on account of his debt cannot, upon the creditor's subsequently recovering judgment against him for the whole amount of the debt, maintain an action against the creditor to recover back the money so paid. *Fuller* v. *Shattuck*, 70.

MONEY PAID.

See EVIDENCE, 15.

MORTGAGE.

I. *Of Real Estate.*

1. A mortgage described the mortgage debt as "two promissory notes, bearing even date herewith, for the sum of five hundred dollars, one payable in 1852 and the other in 1853, with interest to be paid yearly;" and the notes referred to, being produced and identified, were for five hundred dollars each. *Held*, that the notes were competent evidence to explain the mortgage, as against the mortgagor, or one who purchased the equity of redemption with notice that the mortgage was intended to secure both notes. *Crafts* v. *Crafts*, 360.

2. A mortgage made by a member of a voluntary loan fund association to its trus-

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tees, before the passage of the St. of 1854, c. 454, to secure the payment of interest at the rate of six per cent. a year on an advance by the association to him, and of his monthly dues and fines, is valid. *Baxter* v. *McIntire*, 168.

3. A member of an unincorporated loan fund association, who was also their secretary, made a bond and mortgage to the association in contemplation of a loan of a certain amount, part of which he received; but afterwards repaid that amount, on the suggestion of the association that they could not make so large a loan on the security offered; and executed a new bond for the lesser loan which they were willing to make, and cancelled the first bond. *Held*, that if the association never assented to or ratified the cancelling of the first bond, they might still maintain a writ of entry to foreclose the mortgage. *Ib.*

4. Upon the trial of a writ of entry to foreclose a mortgage, the defendant cannot object to the introduction in evidence of a bond corresponding to that described in the condition of the mortgage, except in being for a less sum and dated one day later. *Ib.*

5. An agreement by the purchaser of an equity of redemption, that his grantor may use his name in resisting the foreclosure of the mortgage, is no bar to an action by such purchaser against such grantor to foreclose the mortgage. *Brolley* v. *Lapham*, 294.

6. A warranty deed from a mortgagee, who has entered upon the land for breach of condition of the mortgage, passes his title, and, though unaccompanied by a transfer or assignment of the mortgage notes, enables his grantee to maintain a writ of entry to foreclose the mortgage, and, on producing and filing the notes, to have a conditional judgment. *Ruggles* v. *Barton*, 506.

7. One tenant in common, of real estate conveyed to two, paid his half of the purchase money, and joined with his cotenant in a note and mortgage to secure the payment of the other half, and afterwards released his interest in the land to the mortgagee. *Held*, that his cotenant, or one claiming under him with notice of the facts, could not redeem the estate without paying the whole amount of the mortgage. *Crafts* v. *Crafts*, 360.

8. Two tenants in common of land made a joint mortgage thereof, and one of them afterwards released his interest to the mortgagee, who made improvements upon part of the land with the knowledge of the other mortgagor. On a bill in equity to redeem, by the assignee of the latter, the court ordered that portion to be assigned to him on which no improvements had been made. *Ib.*

See EVIDENCE, 7; HOMESTEAD, 3; INSOLVENT DEBTORS, 6, 8; JUDGMENT, 1; RELEASE; WRIT OF ENTRY.

II. *Of Personal Property.*

9. By a mortgage of "the following personal property, to wit, one bay mare, one cow; one chaise and harness; one sleigh, robes and harness; one saddle and bridle; all the farming tools and other personal property in and about the barn and premises at Herbert Hall; all the furniture, and all other articles of personal property in and about Herbert Hall, so called," a family carriage belonging to the mortgagor passes, if on the premises known as Herbert Hall

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at the time the mortgage is given; and evidence that the mortgagor, immediately afterwards, went upon the premises with the mortgagee, and pointed out this carriage to him as included in the mortgage, is competent evidence to identify it. *Goulding* v. *Swett*, 517.

10. A mortgage of wood standing on land of the mortgagor is a mortgage of personal property, and a record thereof in the registry of deeds is ineffectual, and an office copy of such record incompetent evidence, although the mortgagor resides out of the State. *Douglas* v. *Shumway*, 498.

11. A mortgagee of personal property, from whom, after a foreclosure of the mortgage and a sale of the property, the assignee in insolvency of the mortgagor has recovered its value by suit upon the ground that the mortgage was fraudulent, may maintain an action against the debtor on the mortgage debt. *Whitney* v. *Willard*, 203.

MOTION TO DISMISS.

See PLEADING, III.

MUTUAL INSURANCE COMPANY.

The provisions of the Rev. Sts. *c.* 37, § 40, (which require each agent of a foreign insurance company to deposit a copy of its charter and of his power of attorney with the treasurer of the Commonwealth,) applied to mutual insurance companies. *General Mutual Ins. Co.* v. *Phillips*, 90.

NEGLIGENCE.

See ACTION, 7.

NONJOINDER.

See PLEADING, 8.

NONSUIT.

In an action commenced by a city treasurer against one who has fraudulently transferred shares in a corporation in order to avoid taxation, to recover the penalty imposed by *St.* 1843, *c.* 98, § 3, "one half for the use of the city, and the other half for the use of the person furnishing the necessary evidence in the case," a nonsuit may be entered by agreement of the plaintiff and the defendant, against the objection of the person who furnished the evidence. *Wheeler* v. *Goulding*, 539.

NOTARY PUBLIC.

A notary cannot present a bill or note for payment by deputy, unless authorized by statute or usage of the place where the presentment is made. *Cribbs* v. *Adams*, 597.

NOTICE.

See COUNTY COMMISSIONERS, 2; EXECUTOR, 1, 5; JUDGMENT, 3; LEASE, 2

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NUISANCE.

1. The *St.* of 1855, *c.* 405, § 1, declaring all buildings, places or tenements used for the illegal sale or keeping of intoxicating liquors to be common nuisances, and to be regarded and treated as such, is constitutional. *Commonwealth* v. *Howe*, 26.

2. An indictment on *St.* 1855, *c.* 405, § 1, which avers that the defendant at a certain time and place "did keep and maintain a common nuisance, to wit a certain tenement," (described) "then and there used as a house of ill fame, resorted to for prostitution and lewdness, for illegal gaming, and also then and there used by the defendant for the illegal sale and illegal keeping of intoxicating liquors," need not conclude "to the common nuisance of all the citizens," &c. *Ib.*

3. An indictment for unlawfully keeping a tenement in violation of *St.* 1855, *c.* 405, § 1, is supported by proof of the use of any part of the tenement for the purpose, although it consists of several rooms. *Commonwealth* v. *Ames*, 26.

4. An indictment on *St.* 1855, *c.* 405, § 1, which avers that the defendant kept and maintained a certain tenement, used for the illegal sale and illegal keeping of intoxicating liquors, whereby, and by force of the statute in such case made and provided, the said tenement so kept, maintained and used, was then and there a common nuisance, to the common nuisance, &c., sufficiently avers that the tenement was a nuisance. *Commonwealth* v. *Barnes*, 26.

OFFICER.

See COLLECTOR OF TAXES; CONSTABLE; SURVEYOR OF HIGHWAYS; SURVEYOR OF LUMBER.

ORDER.

See TOWN.

PARTITION.

See APPEAL, 3; EQUITY, 13.

PARTNERSHIP.

1. A contract by one of two partners in the business of building houses, made without the knowledge of the other, to build a house in payment of a private debt of his own, is a fraud upon the partnership, and void, if the creditor knows that the two are partners in that business; and if both partners actually do the work, they or their assignee in insolvency may recover therefor of such creditor, without proving the terms of their copartnership, or that the partner who made the contract agreed that the work should be done by the partnership. *Williams* v. *Brimhall*, 462.

2. An agreement between one partner and a third person that the latter shall participate in such partner's share of the profits of the firm, as profits, renders him liable as a partner to the creditors of the firm, although, as regards the other members of the firm, he is not their copartner. *Fitch* v. *Harrington*, 468.

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3. The acts and declarations of a person not a partner are not admissible to charge him as a partner, without showing that they were brought home to the plaintiff's knowledge. *Ib.*

4. A release by A. of all demands against B., reciting a settlement "between A. on the one side and B. and C. on the other," has no legitimate tendency to prove that there was a joint interest or partnership between B. and C. in the same business during that time. *Farnum* v. *Farnum*, 508.

See EQUITY, 10–12; INSOLVENT DEBTORS, 3–7; SET OFF.

PARTIES TO ACTIONS.

See PLEADING, I; WITNESS, 1–4.

PAUPER.

1. A vote of a town between 1767 and 1789, by which J. S. and others were "constituted" one of the school districts of the town, is no evidence of such approbation of the town of his dwelling there, as was required by the Prov. St. of 7 G. 3, *c.* 3, to give him a settlement in the town. *Inhabitants of Amherst* v. *Inhabitants of Shelburne*, 341.

2. Legitimate children cannot derive a settlement from their mother, without proving that their father had no settlement within the Commonwealth. *Ib.*

3. A man does not obtain a settlement, under the Rev. Sts. *c.* 45, § 1, *cl.* 4, in a town where he owns a freehold, if before he has lived thereon for three years successively he is committed to the state lunatic hospital and there supported as a pauper; although his family continue to reside on his land for the residue of the three years. *Choate* v. *Inhabitants of Rochester*, 92.

4. In an action for the support of a pauper, whose settlement is proved to have once been in the town sued, the burden of proving that he since acquired a new settlement, under the Rev. Sts. *c.* 45, § 1, *cl.* 12, by residing for the space of ten years together in another town, is upon that town. *City of Worcester* v. *Inhabitants of Wilbraham*, 586.

5. Absence from a town, without a definite purpose at all events to return to it as a home, will not interrupt the residence requisite to a settlement under the Rev. Sts. *c.* 45, § 1, *cl.* 4, until a new domicil is acquired elsewhere. *Ib.*

See JUDGMENT, 4.

PAYMENT.

See LIMITATIONS, 3; PLEADING, 9.

PEAT.

See MILL, 3.

PENALTY.

See NONSUIT.

PLAN.

See DEED, 3; EXCEPTIONS, 5.

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PLEADING.

I. *Parties to Actions.*

1. An agent may sue on a written agreement made by him in his own name in behalf of his principal. *Colburn* v. *Phillips*, 64.

2. On a contract of insurance with two jointly on their joint property, one cannot sue alone, without proof of an assignment to him of the other's interest, and of the company's assent thereto. *Tate* v. *Citizens' Mutual Fire Ins. Co.* 79.

See TOWN.

II. *Declaration.*

3. A declaration on an agreement within the statute of frauds need not allege that the agreement is in writing. *Price* v. *Weaver*, 272.

4. In an action by a person other than the payee, on a promissory note not negotiable, a declaration, averring that "the defendant made a promissory note a copy whereof is hereto annexed, payable to J. S., and the plaintiff is the owner of said note, and the defendant owes him the amount of said note," and annexing a copy of the note, but not averring any assignment thereof to the plaintiff, is insufficient; and a judgment rendered thereon by default will be reversed on error. *Hollis* v. *Richardson*, 392.

5. It is no ground of demurrer to a declaration on a written agreement, which sets forth the agreement and a breach thereof, that for some of the items of damage claimed the plaintiff is not entitled to recover. *Colburn* v. *Phillips*, 64

See ACTION, 2, 7; VARIANCE.

III. *Motion to Dismiss.*

6. A motion of the plaintiff to dismiss an appeal from a judgment of a justice of the peace, on the ground that his record does not show that an appeal was taken, need not be made at the first term. *Morse* v. *Lyman*, 394.

7. The filing of an affidavit of merits simultaneously with a motion to dismiss is not a waiver of that motion. *Claflin* v. *Thayer*, 459.

See REPLEVIN.

IV. *Answer.*

8. Nonjoinder of a defendant in an action of contract must be pleaded in abatement. *Edler* v. *Thompson*, 91. *Canfield* v. *Miller*, 274.

9. Under an answer averring payment by note, evidence of payment in money, or by check, is inadmissible. *Canfield* v. *Miller*, 274.

10. In an action upon a promissory note, evidence that the consideration of the note was intoxicating liquor sold by the plaintiff to the defendant, for the purpose of being resold in this commonwealth in violation of law, the plaintiff knowing and aiding in this purpose, is admissible under an answer which alleges that the note was "in payment and compensation for liquors sold in violation of law, and received by the plaintiff without consideration, and again-

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law, equity and good conscience, and no action ought to be maintained thereon, and that the note being given for intoxicating liquors sold in violation of all law, whether in this or any other state, an action thereon is an action for the recovery of the value of intoxicating liquors so sold as aforesaid, and cannot and ought not to be maintained in any court in this commonwealth, such note being not in accordance with the provisions of the *St.* of 1852, *c.* 322." *Hubbell* v. *Flint*, 277.

11. The breach of a warranty on the face of a policy of insurance, not alleged in the answer, nor relied upon at the trial, cannot be taken advantage of at the argument before the full court upon the report of the presiding judge. *Denny* v. *Conway Stock & Mutual Fire Ins. Co.* 492.

See BOND, 3; WITNESS, 2.

PLEDGE.

A broker in New York, to whom negotiable securities had been intrusted by their owner for the purpose of raising money thereon for him, delivered them, one in Connecticut, and the others in Massachusetts, pursuant to an agreement made in New York, as security for a preëxisting debt of his own. *Held*, that his creditor, if he took them in good faith, could not be compelled in equity to give them up to the owner, although by the laws of New York a transfer made under such circumstances is subject to the rights of the real owner. *Culver* v. *Benedict*, 7.

POOR DEBTORS.

1. A debtor arrested on execution, who enters into a recognizance, under *St.* 1857, *c.* 141, § 10, to deliver himself up for examination within ninety days, giving notice as provided in that statute, is bound to procure the attendance of a magistrate, qualified by law to take the examination, within the hour specified in his notice; and if the magistrate does not appear within the hour, the debtor cannot be discharged without a new notice to the creditor. *Adams* v. *Stone*, 396.

2. A recognizance, which recites the obligee's recovery of judgment against the debtor, the issue of an execution thereon, the taking of the oath required by law in behalf of the plaintiff, the magistrate's certificate that he was satisfied that there was reasonable cause to believe the truth of the facts sworn to, the arrest of the debtor, and that he was brought before the magistrate for examination, and did not desire any time fixed for examination, and offered this recognizance, which was accepted; and which is conditioned that the debtor "shall, within ninety days from the time of his arrest, deliver himself up for examination, giving notice thereof as in the statutes in that behalf provided," &c. is sufficient, under the *St.* of 1857, *c.* 141, § 10, without stating that the debtor desired to take the poor debtor's oath, or more definitely naming or describing the magistrate before whom he is to deliver himself up. *Ib.*

PRINCIPAL AND AGENT.

1. An agent of an insurance company, to receive premiums and applications for

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insurance, and transmit policies, has no authority to waive notice of an assignment of a policy. *Tate* v. *Citizens' Mutual Ins. Co.* 79.

2. The title of a principal to goods purchased in his behalf and with his money by his agent, without fraud or such conduct in reference to the purchase as to deceive the agent's creditor, is not affected, as against an attaching creditor of the agent, by the agent's having for a long time previous held himself out to this creditor and other persons as dealing on his own account in other similar transactions. *Selkirk* v. *Cobb*, 313.

See INSURANCE, 1; NOTARY; PLEADING, 1.

PRINCIPAL AND SURETY.

See GUARDIAN, 4; INSOLVENT DEBTORS, 3, 8; PROMISSORY NOTE, 11, 12.

PROBATE COURT.

See JUDGMENT, 3.

PROMISSORY NOTE.

1. No action can be maintained on a note for the price of liquors sold by the plaintiff to the defendant, the plaintiff knowing that they were to be resold in violation of law, and assisting the defendant in that unlawful purpose. *Hubbel* v. *Flint*, 277.

2. The resignation of an office in a corporation is a sufficient consideration for a promissory note, although the maker of the note has previously agreed, for a valuable consideration, to resign the office on demand of the payee. *Peck* v. *Requa*, 407.

3. One who puts his name, before delivery, on the back of a promissory note payable to the maker or order, and indorsed by the maker, is an indorser, and not a joint maker; and his liability cannot be varied by parol evidence. *Bigelow* v. *Colton*, 309. *Lake* v. *Stetson*, 310, note.

4. Parties who indorse their names on a promissory note before its delivery, for the benefit of the maker, are not liable as joint makers, if the payee afterwards indorses his name above theirs before the note is delivered; and other parol evidence is inadmissible to show that they were joint makers. *Clapp* v. *Rice*, 403. *Stinson* v. *Silloway*, 405, note. *Powers* v. *Eastman*, 405, note.

5. Evidence of what was said, in the absence of a payee of a promissory note, by one who had signed it on its face, to induce another to sign it on the back, is inadmissible to show that the latter put his name on the note with authority to fill up the blank with a guaranty only. And the admission of such evidence is not cured by a subsequent finding of the jury that the signature was put on the back of the note before it was delivered. *Draper* v. *Weld*, 580.

6. Evidence that the maker of a promissory note put property into the hands of the first indorser has no tendency to show that the latter signed the note for the accommodation of the maker alone, and not of the maker and the second indorser jointly. *Farnum* v. *Farnum*, 508.

7. In defence of an action by the payee or his assignee in insolvency on a promissory note, it may be shown by parol evidence that it was given as collateral

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security for liabilities incurred by the payee at the request or for the benefit of the defendant, and that the payee suffered no loss by reason of such liabilities. *Slade* v. *Hood*, 97.

8. In an action on a promissory note, evidence that the defendant, at the same interview at which the note was given, gave another note to a third person, which had since been given up as made without consideration, is inadmissible to prove want of consideration of the note in suit; and if admitted by referees under a rule of court, who award in favor of the defendant, subject to the opinion of the court on the admissibility of the evidence, is ground for setting aside the award. *Ib.*

9. A presentment for payment at any bank in Boston, of a note payable "at bank in Boston," or "at either bank in Boston," is sufficient demand upon the maker to charge the indorser. *Malden Bank* v. *Baldwin*, 154. *Hampden Fire Ins. Co.* v. *Davis*, 156, note.

10. If the maker of a promissory note leaves the Commonwealth, abandoning simultaneously both his residence and his place of business here, although his family remain a few months at the former, it is sufficient to charge one who indorsed the note to the plaintiff since the maker absconded, to make a demand at the maker's last place of business, without inquiring at his last residence, or of the indorser, for the maker's present residence. *Grafton Bank* v. *Cox*, 503.

11. Giving time to one of two sureties on a promissory note does not discharge the other, although the first has signed his name on the face, and the other on the back of the note. *Draper* v. *Weld*, 580.

12. Where several persons indorse their names on a promissory note, in order to enable the maker to get it discounted; and some of them afterwards, on the failure of the maker, pay the note; they cannot maintain an action against the others for contribution, without proving that the relation between them was really that of cosureties. But parol evidence of that fact will maintain such an action. *Clapp* v. *Rice*, 403.

13. Damages by the plaintiff to the defendant's property while in his employment cannot be set up in defence of an action on a promissory note given for such services, if a verdict for the plaintiff has been returned in an action brought against him by the defendant to recover such damages. *Stevens* v. *Miller*, 283.

See BILL OF EXCHANGE; EVIDENCE, 14; GIFT; GUARANTY; HUSBAND AND WIFE; INSOLVENT DEBTORS, 8; NOTARY; PLEADING, 4, 9, 10 PLEDGE.

RAILROAD.

See CARRIER.

REAL ACTION.

See ABATEMENT; JUDGMENT, 1; MORTGAGE, 4–6; WRIT OF ENTRY.

RECOGNIZANCE.

See POOR DEBTORS.

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RELEASE.

A purchaser of land gave a promissory note, secured by mortgage thereof, for the purchase money, and entered into possession of the land; and afterwards, by agreement of parties, the note, before payment of any part of it, was given up to be cancelled, and the land was released to the mortgagee. *Held*, that this was no bar to an action of trover by the mortgagee against a purchaser from the mortgagor, with notice, of property attached to the realty. *Hemenway* v. *Bassett*, 378.

See PARTNERSHIP, 4; WAY, 9.

REPLEVIN.

1. A replevin bond, from a person not the plaintiff, with one surety, is not such a bond "from the plaintiff or from some one in his behalf, with sufficient sureties," as is required by the Rev. Sts. *c.* 113, § 29; and if objection is made at the return term, the action of replevin must be dismissed. *Claflin* v. *Thayer*, 459.

2. A motion to dismiss an action of replevin, for want of a sufficient bond, sufficiently states the cause of the motion, by alleging that the officer did not before the service of the writ "take from the plaintiff or some one on his behalf a bond to the defendant with sufficient sureties," &c., enumerating all the requisites of the Rev. Sts. *c.* 113, § 29. *Ib.*

RESTRAINT OF TRADE.

See CONTRACT, 2.

RETURN.

See COLLECTOR OF TAXES, 6; JUDGMENT, 2, 7.

REVIEW.

A writ of review of a judgment of the court of common pleas, granted by this court, and returnable here under the Rev. Sts. *c.* 99, § 25, is to be entered in this court, although the sum demanded is less than $1,000, and the *St.* of 1859, *c.* 196, took effect after the writ was sued out and before its return. *Day* v. *Croak*, 461.

SALE.

1. A in New York and B in Massachusetts made this agreement in writing: "A agrees to furnish stock of sufficient amount to make at least eight and not to exceed twenty cases of boots per week; and B is to take the stock, and make it up to the best of his abilities into boots, and to consign all the boots he makes to A, to be sold by him on a commission of five per cent., the goods to be sold for cash, and the return made to B as fast as made, and B agrees to put up and ship to A at his store in New York at least eight cases of boots per week." *Held*, that the title in stock sent by A to B under this agreement did not pass to B, although accompanied with bills of parcels in common form; and that A might reclaim boots made by B out of this stock from one who had received

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them from B to secure advances made by him to B thereon after being shown the agreement and bills of parcels. *Schenck* v. *Saunders*, 37.

2. A breach of an express warranty of soundness upon the sale of a horse authorizes the purchaser to rescind the contract and return the horse, although there is no express agreement to that effect, and no fraud. *Bryant* v. *Isburgh*, 607.

See DAMAGES, 3, 4; LIEN.

SEARCH WARRANT.

The *St.* of 1856, *c.* 284, § 36, providing for the issuing of warrants by judges of insolvency on the complaint of an assignee, to search for property of the debtor, is unconstitutional and void. *Robinson* v. *Richardson*, 454.

SELECTMEN.

See TOWN.

SENTENCE.

Under the *Sts.* of 1857, *c.* 284, 1858, *c.* 77, and 1859, *c.* 108, at the expiration of the term of imprisonment of a convict, as reduced by his good conduct as appearing on the prison record, according to the scale of deduction provided in those statutes, he is entitled to be discharged by the warden of the state prison, or the keeper or overseer of the house of correction, without a pardon. *Opinion of Justices*, 618.

See INDICTMENT.

SERVICE.

Leaving a summons in the berth of a defendant, in a vessel in which he has taken passage and lies concealed, is no service of a writ. *Craig* v. *Gisborne*, 270.

See TRUSTEE PROCESS, 3.

SET OFF.

A debt due from one partner cannot be set off in an action by the assignee in insolvency of the partnership on a debt due to the partnership. *Williams* v. *Brimball*, 462.

See PROMISSORY NOTE, 13.

SETTLEMENT.

See PAUPER.

SHERIFF.

A sheriff is not liable for the services of a person employed by his deputy to keep property attached by the latter. *Dooley* v. *Root*, 303.

SHIP.

1. No lien can be enforced under *St.* 1855, *c.* 231, for materials used in the construction of a ship, unless specifically furnished to be used in that ship. *Rogers* v. *Currier*, 129.

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2. No lien can be enforced under *St.* 1855, *c.* 231, for timber sold and delivered to the owner in another state, and by him brought into this commonwealth, and here used in building a ship, if there was no express agreement that there should be a lien, nor that the timber should be so applied. *Tyler* v. *Currier*, 134.

SLANDER.

Uttering slanderous words in the presence of the person slandered only is not actionable. *Sheffill* v. *Van Deusen*, 304.

SPECIFIC PERFORMANCE.

See EQUITY, 5, 6, 8, 9, 13.

SPIRITUOUS AND INTOXICATING LIQUORS.

See EVIDENCE, 1, 14; NUISANCE; PLEADING, 10; PROMISSORY NOTE, 1 WITNESS, 2.

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SUPREME JUDICIAL COURT.

Under the *St.* of 1859, *c.* 196, this court, at a law term, has no jurisdiction of matters cognizable by a single judge. *Buck* v. *Wolcott*, 268.

See CONSTABLE, 1; EQUITY, 7; REVIEW.

SURETY.

See PRINCIPAL AND SURETY.

SURVEYOR OF HIGHWAYS.

1. A surveyor of highways cannot recover compensation of the town for his official services. *Sikes* v. *Inhabitants of Hatfield*, 347.
2. Where a highway tax is raised to be expended in labor and materials, a surveyor of highways cannot charge the town for work performed by himself, at his own discretion, beyond the amount of his own tax bill. *Ib.*
3. Votes of a town to raise a certain sum of money for the repairs of highways, and that the same be a labor tax, and "to pay the surveyors one shilling per hour, teams one shilling per hour, and hands fifteen cents per hour," are no evidence of a contract by the town to pay a surveyor for work voluntarily performed by himself upon the highways, beyond the appropriation; even if the town has paid for such services in past years. *Ib.*

SURVEYOR OF LUMBER.

Under the Rev. Sts. *c.* 15, § 33, and *c.* 28, § 141, a surveyor of lumber holds his office until another is chosen and qualified in his stead. *Dow* v. *Bullock*, 186.

TAX.

1. A corporation incorporated by the laws of another state, and authorized by a

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statute of Massachusetts to hold real estate here, is taxable, under the *St.* of 1839, *c.* 189. § 1, and notwithstanding the Rev. Sts. *c.* 7, § 10, *cl.* 2, for stock employed in manufactures in a town in this state where it carries on its business. *Blackstone Manuf. Co.* v. *Inhabitants of Blackstone*, 488.

2. A person who has paid his tax within the time prescribed by the town, and thus obtained a discount thereon, under the Rev. Sts. *c.* 7, § 35, cannot maintain an action against the town to recover back the amount, upon the ground that the tax was illegal by reason of too small a portion of the state tax having been assessed on polls; even if he paid under protest. *Lee* v. *Inhabitants of Templeton*, 476.

See ASSESSORS; COLLECTOR OF TAXES.

TENANT IN COMMON.

See MORTGAGE, 7, 8.

TENDER.

See COLLECTOR OF TAXES, 8; EQUITY, 9.

TIME.

See POOR DEBTORS, 1.

TOWN.

Orders for money, made payable to bearer, drawn by the selectmen of a town and accepted by the town treasurer, without express authority of the town, will not render the town liable to an action in the name of any one other than the person to whom they were issued. *Smith* v. *Inhabitants of Cheshire*, 318.

See COLLECTOR OF TAXES, 3, 4; COUNTY COMMISSIONERS; SURVEYOR OF HIGHWAYS; WAY, 10–12.

TROVER.

See DAMAGES, 4, 5; EVIDENCE, 17.

TRUST.

See DEED, 6; INSOLVENT DEBTORS, 7, 8.

TRUSTEE PROCESS.

1. The grantee of real estate conveyed without adequate consideration cannot be charged as the trustee in foreign attachment of the grantor. *Chapman* v. *Williams*, 416.

2 A city cannot be charged as trustee of a teacher of a public school, paid by a quarterly salary, upon a process of foreign attachment served in the middle of a quarter. *Hadley* v. *Peabody*, 200.

3. After the discharge, by agreement with the plaintiff, of the trustees summoned in a process of foreign attachment, the defendant in which resides out of the Commonwealth, and has not been served with process, the court has no juris-

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diction to order further service; but the action must be dismissed. *Burlingham* v. *Cole*, 271.

See ASSIGNMENT; HUSBAND AND WIFE; JUDGMENT, 2.

USAGE.

See INSURANCE, 7.

USURY.

A bond to the trustees of an unincorporated loan fund association, (the articles of which provide that it shall terminate as soon as its funds shall be sufficient to pay five hundred dollars to each member to whom no advance shall have been made,) by a member who, offering the highest premium, has obtained an advance of five hundred dollars, deducting that premium — to secure the payment, monthly, during the existence of the association, of a sum equal to his monthly due of two dollars, and interest at the rate of six per cent. a year on the whole amount advanced, is not usurious. *Merrill* v. *McIntire*, 157.

VARIANCE.

A declaration in tort alleged that the plaintiff assumed the prosecution of a contract of work, commenced for the defendant by another person, (who had become unable to carry it on,) being induced to do so by the false and fraudulent representations of the defendant that there would be no risk in the plaintiff's undertaking the work, and that the defendant had sufficient funds in his hands due to the former contractor. *Held*, that this declaration was supported by evidence that the defendant, upon being inquired of in behalf of the plaintiff, said that there would be funds enough to complete the undertaking if the former contractor went on and finished it, and that the plaintiff was thereby induced to go on with the work, though the plaintiff testified that he did not mean to assume the job, but only to assist the defendant. *Norton* v. *Huxley*, 285

See BASTARDY PROCESS, 2.

VERDICT.

See PROMISSORY NOTE, 13.

WAIVER.

See ARBITRAMENT AND AWARD, 10, 11; COUNTY COMMISSIONERS, 2, EVIDENCE, 2; PLEADING, 7.

WARRANT.

See COLLECTOR OF TAXES, 1, 2, 6, 7; SEARCH WARRANT

WARRANTY.

See INSURANCE, 2; JUDGMENT, 6; PLEADING, 11; SALE, 2.

WATERCOURSE.

See ACTION, 3–5; MILL, 1–3.

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WAY.

1. A provision in the location of a highway by county commissioners, that the owner of a house, part of which comes within the location, "is to have the privilege to have his house remain as it is, and not be required to remove it until he, his heirs or assigns have occasion to rebuild or remove it," does not prevent him from claiming damages for the expense of removing it, if rendered expedient by the location, or from claiming damages for injuries occasioned to it by such location. *Brown* v. *City of Worcester*, 31.

2. A conveyance of land adjoining land of the grantor, and bounded on the same street, "with a right of way in the street to a street" on the other side of the grantor's land, and a covenant that the street on which the land is bounded shall be of a certain width as far as the granted land extends, is no evidence of an agreement of the grantor to dedicate to the public a strip necessary to make the street of the same width throughout its length. *Ib.*

3. Evidence that a grantor, at the time of making conveyances of lands bounded upon a street, said to his grantees that he should not throw out a strip of his own land, into the street then, but should "eventually throw it out all the way," does not show a dedication of the land to the public. *Ib.*

4. A petition for the assessment of damages occasioned by the taking of land to widen a highway, and a petition for a jury to revise the damages to the same land, assessed by selectmen for altering the grade of the way, may be submitted together to one jury. *Dickenson* v. *Inhabitants of Fitchburg*, 546.

5. Evidence that land taken for a highway had been laid out as a sidewalk is inadmissible in reduction of the owner's damages. But evidence that when it was taken it was probable that it would be improved in that way is admissible. *Ib.*

6. In estimating the value of land taken for a highway, its value to build permanent brick and stone buildings upon in the future is to be considered. *Ib.*

7. The value of land taken for a highway is to be assessed according to its value at the time of the taking, having regard however to the uses to which it may probably be applied. *Ib.*

8. In estimating the damages occasioned by taking land for a highway, no benefit is to be set off which is received by the petitioner in common with other abutters on the same street, no part of whose land is taken. *Ib.*

9. *It seems*, that the surrender of a lease to the lessor, after the land has been taken for a highway, with a release of the lessee's claim to damages, is admissible in evidence on the assessment of the damages. *Ib.*

10. At a town meeting, the town, under an article to see if they would discontinue a town way, voted "to leave it to the discretion of the selectmen;" and at a meeting subsequently called "to see if they would accept the doings of the selectmen in discontinuing the road," the selectmen reported that the way should be discontinued, and the town accepted their report. *Held*, that the way was legally discontinued. *Niles* v. *Patch*, 254.

11. A city is not liable for an injury, caused to a foot passenger on a sidewalk which the city is bound to keep in repair, by the falling of an overhanging mass of snow and ice from the roof of a building not owned by the city,

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although it has so overhung the highway for more than twenty four hours before the accident. *Hixon* v. *City of Lowell*, 59.

12. A traveller upon a highway, who stops and ties his horse outside of the limits of the highway, using due care, cannot, if the horse gets loose and runs upon the highway, and suffers an injury from a defect therein, maintain an action against the town for such injury. *Richards* v. *Inhabitants of Enfield*, 344.

13. A passage way which extended from a street, along and upon both sides of the dividing line between two lots, and was the only means of access to the back part of either, was used uninterruptedly for twenty years by the owners of both lots, without limit, restriction, interruption or objection, or any claim of right except what might be implied from such use; and no mention of any right of way was made in any of the conveyances of either lot for a much longer time. *Held*, that from such use a grant must be presumed, to the owner of each lot, of an easement in that part of the passage way which was upon the other lot. *Barnes* v. *Haynes*, 188.

See ACTION, 4, 5; COUNTY COMMISSIONERS; EVIDENCE, 2, 19, 20; WITNESS, 6

WILL.

Upon the offer for probate of a will, not in the handwriting of the testator, but signed by him, with the usual attestation clause added, signed by three witnesses, one witness testified that he and the second witness signed it at the same time, in the presence and at the request of the testator, without reading it or being told that it was a will, and that the testator directed him where to put his name, but did not sign it in his presence, nor say the signature was his. The second witness testified that the testator, after requesting them to sign it, signed it himself, and declared it to be his will, and then they signed it, and his impression was that the third witness was then present. The third witness testified that the other witnesses did not sign in his presence; that the testator brought the paper to him, and requested him to witness it, which he did in the testator's presence, but without reading it; that he thought the names of the other witnesses were then upon it, but could not say whether the testator's name was; and that the testator did not sign it in his presence, or say anything about his signature. *Held*, that this was sufficient evidence of the execution and attestation of the will. *Tilden* v. *Tilden*, 110.

See CONDITION; JUDGMENT, 3.

WITNESS.

1. On the trial of a libel to annul a marriage, one party cannot be admitted as a witness under *St.* 1857, *c.* 305, § 1, if the other is insane. *Little* v. *Little*, 264.

2. Upon the trial of an action to recover the price of intoxicating liquors, a plaintiff, who has testified that the liquors were sold and delivered in another state, may be asked on cross-examination if he knew or supposed they were to be resold in this commonwealth in violation of the laws thereof, although the only defence pleaded is that the liquors were sold in this commonwealth to be so

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resold. But he cannot be asked whether he had any right to sell liquors in the other state. *Poultney* v. *Mackey*, 280.

3. In an action for an injury to the plaintiff's property by the defendant while in his service, the plaintiff, if a witness in his own behalf, may be asked on cross-examination whether he did not settle with the defendant for his services during the period in question without making any claim for the alleged injury *Miller* v. *Stevens*, 282.

4. A party to a suit, admitted as a witness in his own favor, may testify to his opinion, if an expert. *Dickenson* v. *Inhabitants of Fitchburg*, 546.

5. A witness who has testified to his opinion of the value of land taken for a highway, may be asked, on his examination in chief, the facts and reasons on which his opinion was founded. *Ib.*

6. At a hearing for the assessment of damages occasioned by the location of a highway, a witness, called to testify to the value of land taken on one side of the highway, may be asked on cross-examination concerning the value of land upon the opposite side of the way, although the jury have not had their attention called to land upon that side. *Brown* v. *City of Worcester*, 31.

7. A disputed signature cannot be used in cross-examination of a witness, to test his accuracy as to another signature. *Bacon* v. *Williams*, 525.

8. In an action by an officer on an agreement to indemnify him in selling certain property on execution, permitting the plaintiff to ask the defendant, on cross-examination, what property he had when he made the agreement, is no ground of exception. *Day* v. *Moore*, 522.

9. Evidence that two persons were jointly interested in the buying and selling of horses is irrelevant to the issue of their interest in buying and selling cattle; and a statement relating to it, made on cross-examination, cannot be contradicted. *Farnum* v. *Farnum*, 508.

10. Witnesses called to impeach the credit of another witness, and who have testified that his character for truth was bad, may be asked by the party calling them whether this related wholly or in part to that witness's punctuality in paying his debts. *Pierce* v. *Newton*, 528.

11. A party has no right of exception to the refusal of the judge presiding at a trial to instruct a witness that if he would avail himself of his right to refuse to answer interrogatories, on the ground that the answers might criminate him, he must make the objection before answering anything upon that subject. *Commonwealth* v. *Barnes*, 26.

See EVIDENCE, 17–19; WILL.

WRIT.

See REVIEW; SERVICE.

WRIT OF ENTRY.

A mortgagee may maintain a writ of entry against a subsequent purchaser of the equity of the redemption, who has conveyed it away again, but still remains in possession; and may recover judgment for possession. *Johnson* v. *Phillips*, 198.

See DEED, 6; JUDGMENT, 1; MORTGAGE, 4–6.

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